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No. 97-1235

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In The

Supreme Court of the United States

October Term, 1997

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

CITY OF MONTEREY,

*Petitioner,*

v.

DEL MONTE DUNES AT MONTEREY, LTD. AND  
MONTEREY-DEL MONTE DUNES CORPORATION,

*Respondents.*

On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed January 26, 1998  
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## RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)Del Monte Dunes, et al v. Monterey, City of  
Case No. 86-CV-5042

9/1/87	44	FIRST AMENDED COMPLAINT [1-1] by plaintiff Del Monte Dunes, plaintiff Monterey-Del Monte; jury demand (ti) [Entry date 03/08/91]
12/21/93	105	ORDER by Judge Charles A. Legge re trial procedures (Date Entered: 12/23/93) (cc: all counsel) [3:86-cv-05042] (tmn) [Entry date 12/23/93]
3/4/94	141	JUDGMENT: by Judge Charles A. Legge for plaintiffs in the amount of \$1,450,000.00 and costs; terminating case; appeal filing ddl 4/8/94 (Date Entered: 3/9/94) (cc: all counsel) [3:86-cv-05042] (tmn) [Entry date 03/09/94]

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUITDel Monte Dunes, et al v. City of Monterey  
Docket No. 94-16248

11/15/94	Filed original and 15 copies City of Monterey in 94-16248, City of Monterey in 94-16313 first brief on cross-appeal, (Informal: n) of 35 pages and 2 excerpts of record; served on 11/14/94 [94-16248, 94-16313] (tm) [94-16248 94-16313]
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4/21/95 Filed original and 15 copies Del Monte Dunes' second brief on cross-appeal (Informal: n) of 37 pages; served on 4/17/95 [94-16248, 94-16313] (tm) [94-16248 94-16313]

4/28/95 Filed original and 15 copies City of Monterey in 94-16248, City of Monterey in 94-16313 third brief on cross-appeal (Informal: n) of 26 pages and 5 copies 1 excerpts of record; (minor defcy: excerpts need tan covers); served on 4/28/95 [94-16248, 94-16313] (tm) [94-16248 94-16313]

9/13/96 FILED OPINION: AFFIRMED (terminated on the Merits after Oral Hearing; Affirmed; Written; Signed, Published. J.C. WALLACE, author; Edward LEAVY; Lourdes G. Baird.) FILED AND ENTERED JUDGMENT. [94-16248, 94-16313] (dl) [94-16248 94-16313]

10/4/96 [3095711] Filed original and 40 copies Appellant City of Monterey in 94-16248, Appellee City of Monterey in 94-16313 petition for rehearing with suggestion for rehearing en banc 15 p. pages, served on 10/4/96 PANEL AND ACTIVE JUDGES [94-16248, 94-16313] (em) [94-16248 94-16313]

6/26/97 Filed order FOR PUBLICATION (J.C. WALLACE, Edward LEAVY, Lourdes G. Baird,): The petition for rehearing is GRANTED. No further briefing is required. The parties shall be prepared to argue, for no more than 20 minutes per side, the following issue: Whether the jury, rather than the judge, can

decide if the City of Monterey's actions substantially advanced a public purpose. (see part IIIB. of our opinion.) Arguments shall be held in San Francisco on 8/6/97, at 10:00am. The parties shall direct any further questions to the clerk of the court. [94-16248, 94-16313] (hh) [94-16248 94-16313]

10/28/97

Filed order FOR PUBLICATION (J.C. WALLACE, Edward LEAVY, Lourdes G. Baird,): The panel reheard argument in this case on 8/6/97. The panel has voted not to amend its opinion. The panel has unanimously recommended that the suggestion for rehearing en banc be rejected . . . The opinion in this case will not be amended, and the suggestion for rehearing en banc is REJECTED. [94-16248, 94-16313] (hh) [94-16248 94-16313]

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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)

CITY OF MONTEREY

[LOGO]

CITY HALL, MONTEREY, CALIFORNIA 93940

June 13, 1984

Mr. Melvin Nutter  
Chairman  
California Coastal Commission  
631 Howard Street  
San Francisco, CA 94105

Dear Chairman Nutter:

The last time the City's Del Monte Beach LCP was considered, approximately three months ago, we discussed the two primary unresolved issues between the City and the Commission. These are the appropriate means of access to the Phillips Petroleum property, and appropriate designation for the 22 lots on the seaward side of the undeveloped portion of Del Monte Beach Subdivision.

Approximately a week ago the City received a 48-page letter and attachment from the Coastal Commission staff, dealing with these two issues.

Despite the conscientious effort of both City and Coastal Commission staff, there is not as yet an agreement on these two matters.

Perhaps what you are essentially saying is that you have a genuine concern for the two geographical areas under discussion, and you wish to see them treated as appropriate under the California Coastal Conservation Act of 1976. On this point, we completely agree; I wish to assure you that we have an equal affection for this land and for its proper utilization.

Based on the observation that prolonged discussion of the many issues involved probably would not produce agreement, at least within the time allocated for this purpose. I would like to suggest two common sense alternatives for your consideration.

First, we would ask that you approve the Del Monte Beach LCP as reviewed by and approved by the City of Monterey. I assure you that we conducted many long public hearings, that the issues were thoroughly discussed, and that we approached this task most deliberately and conscientiously. Our one-page attachment explains our position on the two matters.

Secondly, if you choose not to do this, then we request that you direct your staff to work conscientiously with the State Department of Parks and Recreation and the California Coastal Conservancy to the end that these properties be purchased by appropriate State Agencies, as the only appropriate means to achieve significant State objectives and to treat the property owners in a fair way. This is by no means a new idea, as it was the earlier plan of the State to do this, a plan endorsed by the City of Monterey. The recent passage of Proposition 18 and the State's current financial condition would allow this to be done if all parties were committed to this common objective.

What we are essentially saying is that the issues involved are too important to be subjected to differences between public agencies. If the use of the land, for bona fide reasons, is to be so severely constricted and if the land is to remain encumbered of development for the enjoyment

and benefit of all Californians, then let us say so and act accordingly, and expeditiously.

If that is your objective, and your decision, then we will be happy and enthusiastic about joining with you in this effort, and ending a battle over contrived issues which is the result of not facing the fundamental issue. If the public is to use and benefit from the use of this land, then there is a method prescribed in the State Constitution for doing this; it is to purchase the land and to compensate the property owners fairly.

On behalf of the Council and citizens of the City of Monterey, I would respectfully ask that the Commission select one of the above alternatives.

Sincerely,

/s/ Clyde W. Roberson  
Clyde W. Roberson  
Mayor

gm

Attach.

Attached letter sent to the following:

Governor George Deukmejian  
Senator Henry Mello  
Assemblyman Sam Farr  
Assemblyman Eric Seastrand  
Assemblyman Rusty Areias  
Mr. William Briner, Director of Parks & Recreation, State of California  
Mr. Samuel Woods, Chairman, California Coastal Conservancy  
Mr. Michael Fischer, Executive Director, California Coastal Commission

Mr. Joseph Petrillo, Executive Director, California Coastal Conservancy  
Monterey City Council  
Press and Media

### ATTACHMENT

June 14, 1984

#### DEL MONTE BEACH LOCAL COASTAL PLAN

##### Access to Phillips Petroleum Property

The primary thrust of Coastal Commission staff report is that primary access to this site should not be from Del Monte Avenue until a complete and thorough access plan for the entire site has been completed and analyzed. The City of Monterey has had an unusual opportunity of reviewing a specific proposal on the Phillips Petroleum site for the last three years. As part of our review of this proposal there has been an environmental impact report done which included a detailed traffic analysis. In addition there have been numerous meetings with the Del Monte Beach Neighborhood, the City of Monterey Police and Fire Departments, the Planning Commission and City Council. The outcome of all these meetings is that the access to this site has been completely analyzed and it has been determined that the most appropriate *primary* access to this site is via Del Monte Avenue with an *emergency* access along Tide Avenue.

##### Development of Vacant Lots

The staff report to you indicates that development of single family dwellings on the 22 seaward lots west of Beach Way would preclude access and recreational uses

of areas subject to potential prescriptive rights and suggests alternatives to this development. Unfortunately, most of these alternative proposals simply do not take into account the fact that these lots are individually owned, and there are eleven different owners of the twenty-two seaward lots. Also the staff report to you does not take into account that the City of Monterey has already evaluated the alternative schemes proposed by your staff - cluster development, transfer of development rights, etc. with no success. The City made a considerable effort to get the property owners together on a cluster development proposal. The City approves the concept, but the City and the Coastal Conservancy were not able to achieve this program. As part of any proposed development in this area, we are not only requiring that Tide Avenue be extended which will enhance the public accessibility to the beach, but we are also requiring that additional parking spaces be included for the general public in this area, prior to the development of the unimproved lots.

In summary, our position is that we have fully studied the alternative access routes and the alternative development concepts fully and they are simply not viable. We would urge your [sic] to adopt the plans as submitted by the City of Monterey.

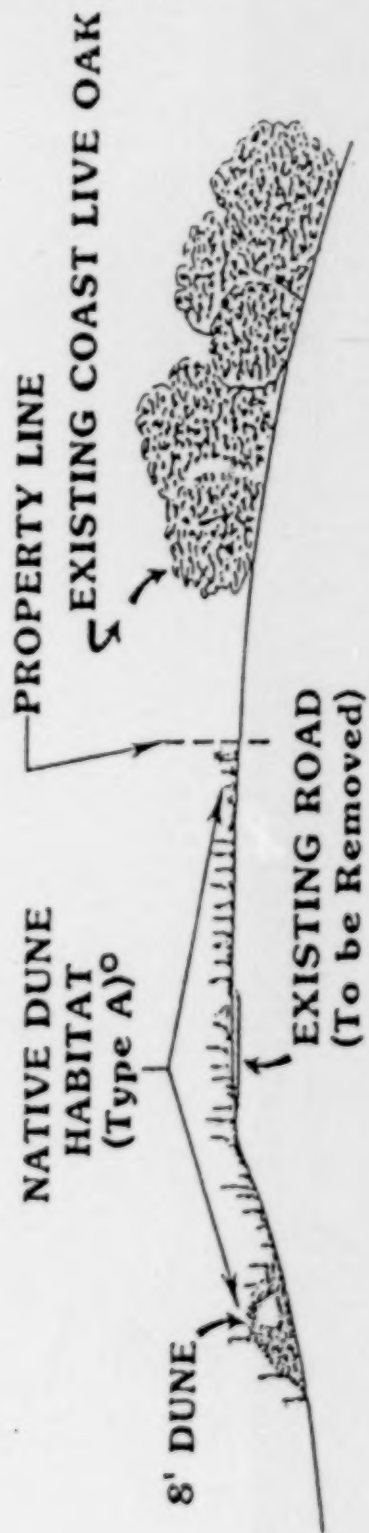
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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)

**RESTORATION PLAN  
PHILLIPS PETROLEUM SITE**

**MONTEREY, CA**



RESTORATION PLAN FOR THE  
PHILLIPS PETROLEUM SITE,  
DEL MONTE BEACH, MONTEREY, CALIFORNIA

Prepared for:

Ponderosa Homes  
2635 N. First Street  
San Jose, California 95134

Prepared by:

Bright & Associates  
1200 N. Jefferson, Suite B  
Anaheim, California 92807

July, 1984

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## DUNE RESTORATION PLAN

1. INTRODUCTION

Ponderosa Homes is proposing to construct a residential development on property located in the Del Monte Beach area of Monterey, California (see Figure 1). The site is bounded on the north by the ocean, on the east by state property administered by the State Department of Parks and Recreation, on the south by private property and the Southern Pacific Railroad spur parallel to Del Monte Avenue, and on the west by the Del Monte Dunes neighborhood. The site historically was used as a petroleum tank farm. Some buildings, storage/processing tanks, oiled tank pads, paved roads, pipeline right-of-ways, etc., still exist.

The site, 37.6 acres in total, contains a disturbed Coastal Strand habitat, i.e., a mixture of native and disturbed sand dune and non-native species. The disturbed nature of the site is due to past petroleum activities,

construction of Highway 1, planting of ice plant as ground cover, use of the site as an off-road vehicle area, unauthorized dumping of various kinds of debris, etc. The greatest impact on the dune habitat historically was the introduction of the two species of ice plant to stabilize the dune while the petroleum activities were being conducted. These two species now occupy about 25% of the entire site. Most recently, the greatest impact has been from off-road vehicles.

II. GOALS OF THE RESTORATION PLAN

The most important goal of this dune Restoration Plan is to achieve effective restoration, enhancement and maintenance of about 10.0 acres of the Phillips Petroleum site, e.g., removal of the remaining petroleum facilities, phased removal of the ice plant, creation of new dunes and stabilization of certain existing dunes, and addition of dune species in appropriate portions of the restored area.

The general goals of the plan are as follows:

- A. Reduce the potential for uncontrolled sand erosion on certain portions of the Phillips site.
- B. Enhance portions of the site to achieve native-like conditions.
- C. Replace or restore dune areas lost or damaged by development of the project.
- D. Provide potential habitat areas for the Smith's Blue Butterfly, *Euphilotes enoptes smithi*.



- E. Develop short-term and long-term maintenance plans to assure that the restoration activities maintain reasonable vitality.
- F. Eliminate exotic plants, e.g., ice plant, which tend to out compete and destroy native vegetation.
- G. Coordinate restoration efforts with the ongoing restoration plan established after construction of the wastewater interceptor line which traverses the project site.
- H. Provide a restoration program which achieves the goals of the City of Monterey and the Del Monte Beach Local Coastal Plan.

### III. EXISTING SITE CONDITIONS

The project site presently is vacant, but it has been historically altered by three major events: petroleum activities, construction of Highway 1, and, most recently, by construction of the wastewater interceptor line which traverses the site. The dune area over the interceptor line has been altered by the addition of "new" 15' high dunes, jute matting, snow fencing, irrigation, hydromulching and revegetation activities. In addition to the three major events, there has been extensive damage to the dunes habitat associated with uncontrolled off-road vehicle activities.

Vegetation on the 37.6 acre project site consists mostly of prostrate and succulent groundcover which acts to stabilize the dynamic sand dune environment. Most of the site, about 25%, is covered with sea-fig,

*Mesembryanthemum chilense*, and hottentot-fig, *Mesembryanthemum edule*. Both of these species of "ice-plant" are african plants, i.e., non-native, and they are very hardy, competitive plants. They have, because of a high percent cover of the sand, stabilized most of the project site. They also have displaced some of the less competitive native dune species. There appears to be a continual flux in the abundance of this plant on the site, i.e., it dies back in some areas, and increases in other areas. However, in general, this plant very slowly is occupying a greater percentage of the Phillips site. We estimate that the increase per year, on the average, is about 0.005%.

The native vegetation includes coast live oak (*Quercus agrifolia*), buckwheat (*Eriogonum latifolium*), silver beach weed (*Ambrosia chamissonis*), several species of lupins (*Lupinus* sp.), dune grass (*Poa douglasii*), deerweed (*Lotus scoparis*), and heather goldenbush (*Haplopappus ericoides*). A row of mature, non-native eucalyptus trees are located near the back dune area in the southwestern portion of the site. The coast live-oaks primarily are located along the back, protected portion of the dune and they aid in stabilizing that portion of the dune. See Table 1 for a more complete list of plant species identified on the Phillips Petroleum site and Figure 2 for the general distribution of plants on the site.

The buckwheat plant, *Eriogonum latifolium*, occurs in patches on several portions of the project site. It is estimated, from field reconnaissance and interpretation of recent aerial photographs that it now occurs on about 0.5% of the site (1.88 acres). There have been changes in recent years in the number of individual plants of this species on the site. Arnold estimated that there were 65

plants in 1982, Turner estimated that there were about 250 plants in 1983, and our count in 1984 indicated over 1,000 plants. The increase in the number of plants indicates two things: first, there is recruitment, i.e., addition of new plants, and second, certain of the plants are maturing. The plants presently on the site demonstrate varying [sic] degrees of maturity and survival. Based on random checking of plants during field reconnaissance in June and July, 1984, about 38-40% of the plants are mature; mature indicating a plant of about 0.4 to 0.65 meter (about 16-26") in height, with at least 8 petioles of 3-4 decimeters (about 12-16") in height, and with the inflorescence (flowerhead) about 20-30 millimeters (around 1") in width. In spite of the increase in the number of plants, the general distribution (occurrence over the site) of *Eriogonum latifolium* has not increased since 1981, i.e., it is found on only 0.5% of the site.

There is another buckwheat, *Eriogonum parvifolium*, characteristically found in the adjacent sand dunes to the northeast. However, during our field reconnaissance since 1981, we have not found this species on the Phillips Petroleum site. Arnold (1982) found some individual plants of this species along the embankment next to the railroad tracks, Del Monte Boulevard, and California Highway 1. We believe that these plants were on the property immediately adjacent to the Phillips site.

There are several species of animals commonly found on the Phillips site, namely: western fence lizard (*Sceloporus occidentalis*), alligator lizard (*Gerrhonotus multicarinatus*), tree swallow (*Iridoprocne canadensis*), white crowned sparrow (*Zonotrichia leucophrys*), purple finch

(*Carpodacus purpureus*), and a variety of insects, e.g., ants, beetles, flies, etc.

Extensive studies have been completed on the occurrence of the Smith's Blue Butterfly (*Euphilotes enoptes smithi*). Arnold (1983) conducted extensive research on the ecology of this butterfly, particularly at two sites on the Fort Ord Army Reservation located about 2.0 miles east of the Phillips site. Arnold noted that this species is widely distributed as scattered, isolated populations occurring from the Rocky Mountains to the West Coast. Populations are associated with their larval foodplant *Eriogonum*, typically in habitats with sand dunes or rocky hillsides, at elevations ranging from sea level to 3,350 meters. Populations of the Smith's Blue Butterfly confined to Coastal Monterey County, occur in various dune and canyon habitats. There are six dune habitats in the Coastal Monterey area, i.e., mouth of the Salinas River, Marina Beach dunes, Fort Ord, Seaside Dunes, Monterey Dunes (Phillips site), and Point Lobos State Reserve. Arnold considers the Seaside Dunes as almost extirpated, and the Monterey Dunes as largely decimated.

No eggs, larvae or adult Smith's Blue Butterflies were found on the Phillips site during our late-June to mid-July field reconnaissance during 1981, 1982, and 1983; further, none were found through July 12, 1984. Arnold (1982) did find eight eggs and 42 larvae after examining 130 flowerheads of *Eriogonum parvifolium* located along the railroad track near Highway 1 (Note, that above it is stated that we believe that this species of buckwheat was found on the property immediately adjacent to the Phillips petroleum site). Thus, prior to July, 1984 we found no evidence of any life stage of the butterfly on the



Phillips site. However, on July 12, 1984 we found three larvae: One was found west of the midline of the property, and two were found near the eastern margin of the property (see Figure 2 for the locations). The occurrence of these three larvae in 1984 as contrasted with the years 1981 through 1983, most likely is associated with the increased maturity of the *Eriogonum latifolium* plants on the Phillips site.

Arnold (1983) estimates that the Monterey Dunes (Phillips site) habitat comprises about 1% of the Smith's Blue Butterfly total habitat in the Monterey Coastal area. Further, Arnold notes that the successful existence of this species is based on having adequate available, usable space. Recent research has indicated that as the breeding area for butterflies decreases, there is an adverse impact on the survival rate and lifespan of the butterflies. This implies that for patchy habitats, i.e., habitats that are discontinuous geographically and variable in size from small to smaller, species will reach a level where the survival rate will be very low and where the possibility of extinction is very high. This habitat influence is particularly significant for the Smith's Blue butterfly since the potential for colonization is very low to nonexistent. Unless the habitat on the Phillips site is increased in size and unless the habitat achieves a greater level of viability, the possibility of the Smith's Blue Butterfly actively and successfully using the Phillips site is deemed to be very low. Since the butterfly has not used the site in recent years prior to 1984, it indicates that the habitat has not been suitable. Further, the limited distribution of the food plant on the site (0.5%), even if the majority of the plants

were mature, precludes the site ever supporting a large population of butterflies unless the site is restored.

#### IV. ACCESS TO THE PHILLIPS SITE

There are three options for access to the Phillips site: via Tide Avenue on the western margin of the site, through the state property on the eastern margin of the site, and via Del Monte Avenue on the southern margin of the site. Considering only the present biotic nature of the Phillips site, the potential impacts of developing about 19.5 acres of the site (see Figure 1), and the feasibility of a successful restoration plan, the access via Del Monte Avenue represents the best option. It should be noted that two access points to the proposed Ponderosa Homes development will be required, a main access and a separate emergency access. The reasons that the Del Monte access represents the best option are:

- A. Access via Tide Avenue would require a road extending to the west across the middle of the Phillips site. This road would enter the proposed project and continue westward to allow development of a suitable public parking area. Since the area around the public parking already has been modified, i.e., in some places with 15' high dunes, it will be necessary to provide a wind-break along the seaward margin of the road to keep the moving sand from covering the road. This situation would be very comparable to that near Palm Springs, California, where Caltrans has planted a living wind-break of Tamarisk trees. Adding a wind-break on the Phillips site



would yield very negative impacts on the dune areas, i.e., it would alter sand movement, alter the succession of dune plant species, etc.

- B. Access via the State property would require a longer entry road across the dune areas, both for entrance to the project and to the public parking area, and thus a greater length of wind-break would be required. The location of the wind-break would generate negative impacts on the dynamics of the dune to a greater extent than the Tide Avenue option since it would impact both the Phillips site and the State property.
- C. Access via Del Monte Avenue would require removal of an existing paved road, which varies in width from 16-18', removal of existing buildings and paved parking areas, and loss of two-four coast live oak trees. This access would not alter the dynamics of the dune processes since it would be located on the furthest inland portion of the dune. Further, this access will allow development of some semi-isolated areas, i.e., from human activity, where restoration can be carried out to provide significant new habitat for the Smith's Blue Butterfly.

Based on our biotic evaluation of the site, and the potential for success of the restoration plan described below, we recommend that the main access to the site be via Del Monte Avenue, and that the emergency access be via Tide Avenue provided that the emergency access is constructed in such a way as to preclude unauthorized entry by any type of vehicle.

## V. PROJECT RELATED HABITAT IMPACTS

Residential development is proposed on approximately 19.5 acres of the Phillips site (see Figure 1). This acreage will be used as follows: 4.5 acres for buildings, 4.5 acres for paved streets, and 10.5 acres for landscaping. In addition, there will be about 0.65 to 1.0 acre of paved area for the access road leading from Del Monte Avenue depending upon the final route of the road. About 65% of the access road already is paved, and the resultant impacts will be less than if the road were constructed on an undisturbed dune area. The total developed area will occupy about 20.5 acres, leaving about 17.1 acres undeveloped.

The present habitat of the area to be developed, exclusive of the access road, based on field reconnaissance and interpretation of aerial photographs, is as follows: tank pad sites = 0.70 acres; ice plant coverage = 7.70 acres; areas with hardened oil fragments, remnants of pipelines, etc. = 3.30 acres, and dune habitat (both undisturbed and disturbed) = 7.80 acres. We estimate that 65% of this dune habitat is disturbed.

The proposed development will require removal of the tank pad sites, the ice plant, hardened oil fragments, remnants of pipelines and the 7.80 acres of undisturbed and disturbed dune habitat. Accordingly, there will be a loss of some *Eriogonum latifolium* and other dune plants. Construction of the proposed access road will not result in the loss of any *Eriogonum latifolium*, but it will result in the loss of about two-four coast live oak trees, depending upon the final selection of the access road route, and it also will result in the removal of considerable ice plant.

## VI. RESTORATION PLAN POLICIES AND CONCEPTS

A Restoration Plan is proposed which will restructure, restore or augment existing conditions. The basic components of the plan include: construction of 8' and 15' dunes and the addition of jute matting and snow fencing on the exposed margins of the most seaward dunes; revegetation of areas where existing plant cover consists of non-native species, and addition of dune plant species in restructured and restored areas; and a maintenance program essential for making the restoration plan successful. The plan is presented with two options: Option A which allows for central entry of the access road to the project area and with the public parking located in the middle of the project area, i.e., on the seaward margin; and Option B which allows for entry along the western half of the project site and with the public parking located on the western half of the project area (see Figures 3, 4 and 5).

In order for the restoration plan to be effective several short-term and long-term actions are required, namely:

### A. Prohibition of Off-Road Vehicles

An extremely important aspect of the restoration plan will be to prevent off-road vehicles from driving on any of the dune areas on the site. Such abuse of the dunes will delay/inhibit restoration and preservation activities, disturb the Smith's Blue Butterfly, etc. Therefore, the following policies will be implemented:

- Fencing shall be provided to prevent entry into the dune areas, e.g., where internal

roads dead-end; however, such fences shall not prohibit public access to the adjacent beach area.

- Areas established for public access to the dune areas and the beach shall be fenced to prevent vehicular entry.
- Appropriate signs shall be placed at public access points indicating that the use of off-road vehicles on any portion of the dune area and adjacent beach is prohibited.
- A vehicle barricade shall be placed opposite the extension of Tide Avenue; this barricade must be strong enough to withstand easy removal by a winch on an off-road vehicle but also constructed so as to provide an emergency access acceptable to the City of Monterey Fire and Police Departments.
- Occupants of the proposed project will be informed of the dune restoration program and advised to call enforcement agencies if they see off-road vehicles in the dune areas.

### B. Public Access Trails

Two major public access trails will lead from the public parking areas to the beach. There will be other "natural" trail areas within the dunes between the beach and the public parking area. These will be clearly marked to limit unnecessary foot traffic across restored areas. Further, where the opportunity for developing "new" trails is high, a 4' high snow fence will be added to "direct" traffic along the prescribed paths. A well designed access pathway will be required at the area



opposite Tide Avenue to preclude indiscriminate entry to the restored dune areas.

The following policies will be implemented:

- Public access to the dune areas and the adjacent beach will be focused by locating the public parking at the end of the entrance road to the project area.
- Public access trails will be clearly marked.
- Occupants of the proposed project will be informed of the presence of public parking and related access trails and advised to call enforcement agencies if they see individuals damaging the public facilities or the adjacent restored dune areas.

#### C. Preservation Areas

Certain areas with native dune plants and some areas with restored dune plants shall be considered preservation areas, i.e., areas where public access will be restricted. Plants and animals in these areas will have the opportunity to develop without direct human influences. The largest preservation area will be on the lower portion of the back dune, adjacent to the access road. This area is designed to be generally isolated from human activity (see Figures 3, 4 and 5). The concerns and related policies are as follows:

##### 1. Pre-Construction Activities:

Certain portions of the site will be preserved or only require minor enhancement, such as the area with the eucalyptus trees, the areas with coast

live oaks and portions of the dunes areas along the eastern margin of the project area. Prior to construction, where no development or only minor enhancement will occur, such areas shall be temporarily fenced to prevent accidental trampling, accidental damage by vehicles/heavy equipment, etc. All construction workers will be informed about these areas and why they are fenced. The fences will remain in place until construction activities are completed.

##### 2. Post-Construction Activities:

Following construction activities, preservation areas shall be permanently secured from trampling by a "living fence", e.g., line of coast live oaks, or by a retaining wall or the access road or by a 8'-15' high dune. Well marked walkways will be provided from the main public access point (parking area) to the beach to limit trampling of native dune species.

#### D. Areas Altered by Construction

##### 1. Pre-Construction Activities:

In areas where development is proposed, a landscape architect, biologist or other person knowledgeable about native dune species, shall, immediately prior to grading, be responsible for removing and preserving as many native dune seedling plants and seeds



as possible. The seedlings will be planted in areas not proposed for development and where no dune restoration is required (see Figures 3, 4 and 5), or kept either on or off the site where they will be protected from construction activities, visitors to the beach, etc. All such seedling plants must be handled carefully to help assure their continued vitality. It is anticipated that for certain of the species the mortality rate will be 50-60%.

Seedlings and seeds will be obtained from *Eriogonum*, *Haplopappus*, *Ambrosia*, *Abronia*, *Lupinus*, *Lotus*, etc. Any coast live oaks removed for the construction of the access road will be relocated immediately to the site for the "living fence."

## 2. Post-Construction Activities

The short-term objective is to restore and stabilize the dune areas altered by construction and other human activities. The long-term objective is to add or resculpture dunes, remove non-native species, plant dune species, and protect the restored areas by precluding unnecessary public access and enforcing an effective maintenance program.

As soon as possible, dune restoration/resculpturing shall be commenced. It is very important that re-vegetation of the dunes begin immediately thereafter to minimize the potential for excessive erosion. The time sequence preferred [sic] is as follows: regrade, resculpture or

develop dunes in the summer after the strong spring winds; and begin revegetation or augmentation planting in early fall so that plant vitality will be enhanced by the rainy season.

A temporary irrigation system will be required, in certain areas, such as along the "living fence." Some of the revegetated areas initially will require occasional irrigation to allow the vegetation to become established. After the plants are established, the system can be turned off and used only when damaged, disturbed, etc., areas are replanted as part of the maintenance program.

In areas most susceptible to wind erosion, i.e., those areas planted with Type B vegetation (see section on Plant Types which follows), jute matting will be used to reduce sand movement (see Figures 3, 4 and 5). Snow fencing also will be used for this purpose. Stable, hardy, low-lying dune plants will be placed on the bluff of the dunes, which are subject to the most severe environmental conditions, e.g., dune grass, *Ambrosia*, *Abronia*, etc. More bushy, woody shrubs, e.g., *Eriogonum*, *Lupinus*, *Haplopappus*, etc. will be placed on the more protected portion of the dunes. These plants will provide a reasonably extensive root system and will be important in stabilization of the dune areas. Note, for certain areas, there will be a positive impact from the proposed buildings, i.e., they will help to reduce wind erosion and thus aid in dune area stabilization.

As the dune areas are reconstructed or newly constructed, seedling plants and seeds will be added.

Clearly defined walkways will be provided from the public parking area and from the adjacent residential area to the beach so that trampling across dune areas will be substantially minimized.

#### E. Areas to be Enhanced

The dune areas with ice plant will be reconstructed by removing the ice plant, recontouring (e.g., adding a 8-15' dune, creating a shallow depression of 1-1.5', etc.) and replanting with Type A or Type B vegetation (see Figures 3, 4 and 5 and discussion on Plant Types below). The new plants initially will be observed on a weekly basis to assure their survival, to remove any regrowth of ice plant, etc. Note, that in certain areas adjacent to the access road, the eucalyptus trees and the coast live oak, it initially may be necessary to leave patches of ice plant to provide some dune stabilization until the adjacent plants in the revegetated areas are stabilized. Subsequently, all of the remaining ice plant will be removed.

#### F. Plant Types

The plants found on the site are listed in Table 1. For purposes of the restoration plan, we have evolved two assemblages of plants, i.e., Type A and Type B. Type A plants will be used in the hinddune and more protected locations and Type B plants will be used on the foredune and the topdune areas.

#### Type A Plants:

*Baccharis pilularis*  
*Eriogonum latifolium*  
*Eriogonum parvifolium*  
*Haplopappus ericoides*

*Lotus Scoparis*  
*Lupinus arboreus*

Coyote Bush  
 Buckwheat  
 Buckwheat  
 Heather  
 Goldenbush  
 Deerweed  
 Bush Lupine

#### Type B Plants:

##### Foredune Areas:

*Abronia latifolia*  
*Ambrosia chamissonis*  
*Artemisia dracunculus*

Sand Verbena  
 Sand Verbena  
 Tarragon

##### Topdune Areas:

*Abronia latifolia*  
*Abronia umbellata*  
*Poa douglasii*

Sand Verbena  
 Sand Verbena  
 Dune Grass

#### G. Plant Handling

A plan for sequential removal and immediate replanting of Type A and Type B plants will be developed with the general contractor. Such a plan will require careful handling of all seedling plants, cuttings and seeds.

The seedling plants removed from the site will be immediately planted. Cuttings taken from the plants will be propagated on-site or at an adjacent nursery area. New seedling plants will be generated from the seeds collected on the site or at immediately adjacent sites.

In certain areas hydromulching will be needed. Seeds to be sowed will include those from *Abronia latifolia*,



*Eriogonum latifolium* and *parvifolium*, *Haplopappus ericoides* and *Poa douglasii*.

As the new dune/existing dune areas become available, the Type A and Type B plants will be added in the areas to be enhanced or restored (see Figures 3, 4 and 5).

On a priority basis, the area to be replanted with Type A plants located between the "living fence" and the access road/eucalyptus trees, should be developed as soon as possible. Preferably, this area should be prepared for revegetation prior to any site improvements in the 19.5 acre project area. That way, plants in the project area can be relocated, cuttings taken, etc., before site improvements begin. It is believed that this area will be the most suited for use by the Smith's Blue Butterfly.

## VII. MAINTENANCE PROGRAM

The restoration plan must include a short- and a long-term maintenance program. The short-term program will involve a site walk-through by a landscape architect or the equivalent on about a biweekly basis for at least 18 months after the initial restoration/enhancement activities begin. If the construction of the project takes longer than 18 months, the biweekly visits should extend at least nine months beyond the date of final construction. During the biweekly visits the dune areas will be examined and the following maintenance actions taken:

- A. Dead or dying replanted Type A or Type B vegetation will be removed and replaced as soon as possible.
- B. Areas of sand blow-out, or vegetation trampling will be noted and repaired/replaced.

- C. Snow fencing and jute matting will be checked and repaired/moved as needed.
- D. Any reoccurrence of ice plant will be noted and all such ice plant removed, and, if feasible, the area replanted with native dune species.

The long-term maintenance program will involve a site reconnaissance on about a quarterly basis to assess blow-outs, trampling, wind damage, damage to public walkways and related signs, etc. Repairs and replanting should be made as soon as feasible and considering seasonal influences. Effectiveness of the long-range maintenance plan will depend upon a responsible entity being assigned the responsibility for accomplishing the maintenance in a prudent and efficient manner.

TABLE 1  
AMBIENT VEGETATION

SCIENTIFIC NAME	COMMON NAME	NATIVE OR INTRODUCED
<i>Abronia umbellata</i>	Sand verbena	N
<i>Ambrosia chamissonis</i>	Silver beach weed	N
<i>Ambrosia</i> sp.		N
<i>Ammophilum arenaria</i>	European beach grass	I
<i>Artemisia douglasiana</i>	Mugwort	N
<i>Artemisia dracunculus</i>	Tarragon	N
<i>Artemisia pinocephala</i>	Beach sagewort	N
<i>Baccharis pilularis</i>	Coyote bush	N
<i>Castilleja latifolia</i> *	Monterey paint- brush	N

\* Listed as rare but not endangered by California Native Plant Society (CNPS)



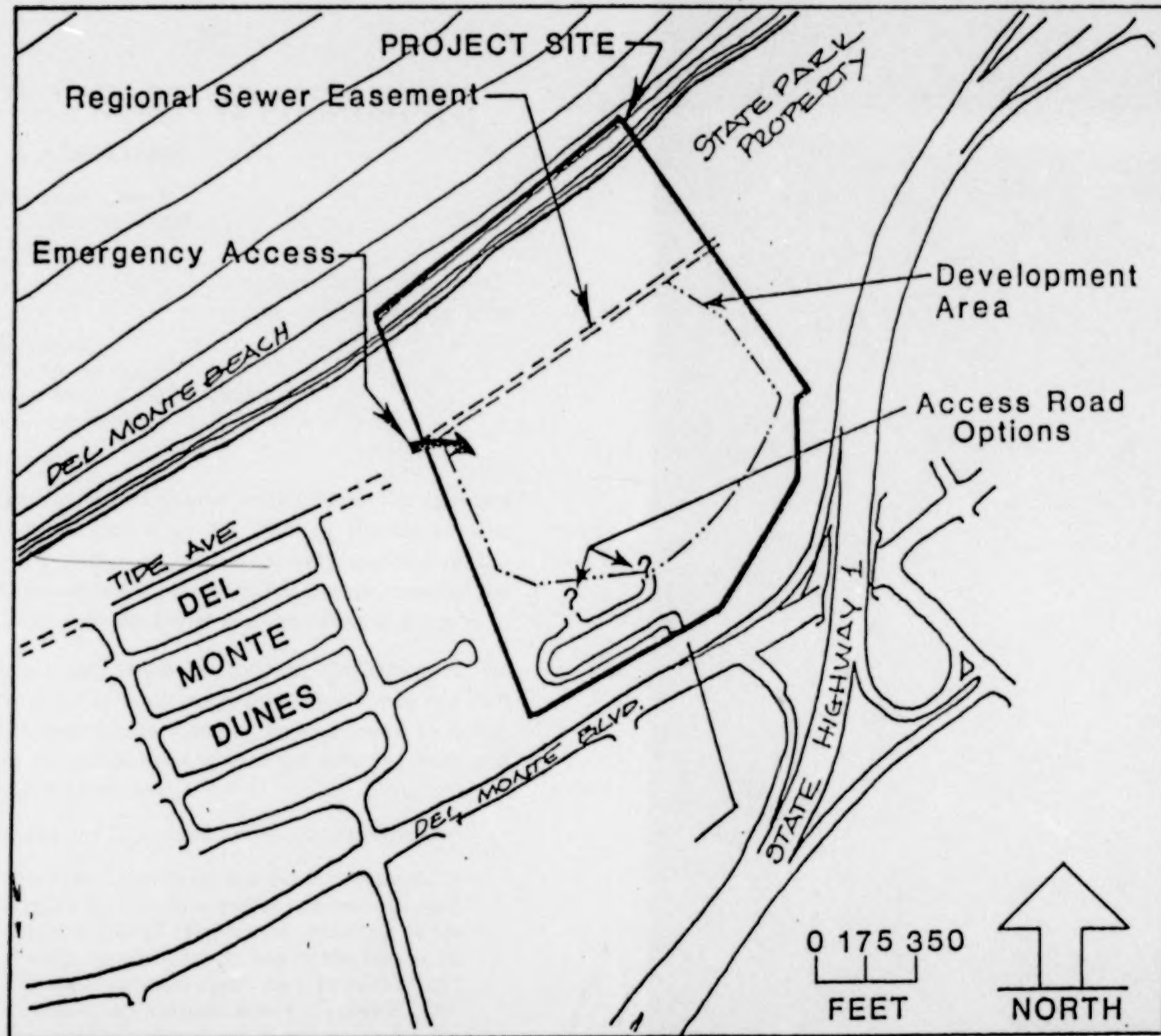
<i>Conium maculatum</i>	Poison Hemlock	N
<i>Convolvulus soldanella</i>	Beach morning glory	N
<i>Croton californicus</i>		N
<i>Dudleya caespitosa</i>	Live-forever	N
<i>Eucalyptus</i> sp.	Eucalyptus	I
<i>Eriogonum latifolium</i>	Buckwheat	N
<i>Franseria chamissonis</i>	Beach burr	N
<i>bipinnatisecta</i>		
<i>Haplopappus ericoides</i>	Heather golden-bush	N
<i>Heterotheca grandiflora</i>	Telegraph weed	N
<i>Lotus scoparis</i>	Deerweed	N
<i>Lupinus arboreus</i>	Bush lupin	N
<i>Lupinus chamissonis</i>	Lupin	N
<i>Lupinus</i> sp.	Lupin	N
<i>Mesembryanthemum chilense</i>	Sea-fig	I
<i>Mesembryanthemum crystallinum</i>	Ice plant	I
<i>Mesembryanthemum edule</i>	Hottentot-fig	I
<i>Oenothera cheiranthifolia</i>	Beach primrose	N
var. <i>cheiranthifolia</i>		
<i>Oenothera cheiranthifolia</i>	Beach primrose	N
var. <i>nitida</i> **		
<i>Phacelia</i> sp.		N
<i>Poa douglasii</i>	Dune Grass	N
<i>Polygonum paronychia</i>	Beach knotweed	N
<i>Pteridium aquilinum</i>	Bracken Fern	N
<i>Quercus agrifolia</i>	Coast live oak	N
<i>Rhamnus purshiana</i>		N
<i>Rubus ursinus</i>	California Blackberry	N
<i>Solanum nodiflorum</i>		I
<i>Solanum umbelliferum</i>	Nightshade	N
<i>Tetragonia expansa</i>	New Zealand Spinach	I

\*\* Listed as rare by Abrams but not CNPS

# VIII. REFERENCES

- Arnold, Richard A. Letter to Gary Deghi, Earth Metrics, Inc., re Smith's Blue Butterfly at Phillips Petroleum Site in Monterey, CA. September 19, 1982.
- Arnold, Richard A. Ecological Studies of Six Endangered Butterflies (Lepidoptera, Lycaenidae): Island Biogeography, Patch Dynamics and the Design of Habitat Preserves. University of California, *Entomology*, 99: 1-161. 1983.
- Cooper, W.S. Coastal Dunes of California. Geological Society of America, *Memoirs*, 104: 1-131. 1967.
- Diamond, J. M. The Island Dilemma: Lessons of Modern Biogeographic Studies for the Design of National Preserves. *Biological Conservation*, 7: 129-146. 1975.
- Earth Metrics. Draft Environmental Impact Report, Ponderosa Homes project at Del Monte Beach. Earth Metrics, Burlingame, California, 114 pp. plus appendices. 1982.
- Emmel, T.C., and J.F. Emmel. The Butterflies of Southern California. Natural History Museum, Los Angeles County, Science Series, 26: 1-148. 1973.
- Howard, A.Q. and R.A. Arnold. The Antioch Dunes - Safe at Last. *Fremontia*, 8: 3-12. 1980.

- Mattoni, R. H. Notes on the Genus *Philotes* (Lycaenidae: Lepidoptera) I: Description of Three New Subspecies and a Synoptic List. Bulletin, Southern California Academy of Sciences, 53(3): 157-165. 1954.
- McBride, J.R. and E.C. Stone. Plant Succession on the Sand Dunes of the Monterey Peninsula, California. American Midland Naturalist, 96: 118-132. 1976.
- Powell, J.A. Endangered Habitats for Insects: California Coastal Sand Dunes. Atala, 6: 41-55. 1981.
- San Bruno Mountain Committee. San Bruno Mountain Area Habitat Conservation Plan. San Bruno Mountain Habitat Conservation Plan Steering Committee, Volume One and Two. 1982.
- Williams, W. T. and J. R. Potter. The Coastal Strand Community at Morro Bay State Park, California. Bulletin, Torrey Botany Club, 99: 163-171. 1972.



**VICINITY MAP**

**FIGURE 1**

BRIGHT & ASSOCIATES



**UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.E.)**

**BRIGHT & ASSOCIATES**

1200 N. Jefferson Unit B  
Anaheim, California 92807  
(714) 632-8521

July 25, 1984

Mr. Ralph Swanson  
Fish & Wildlife Service  
2800 Cottage Way, Room E-1823  
Sacramento, CA 95825

Dear Mr. Swanson:

We have continued to meet with a variety of agencies regarding development of the Phillips Petroleum site, Monterey, CA. Although no one has yet signed-off on the proposed habitat restoration plan for the site, most of the agencies have indicated that the approach is correct.

Based on our latest analysis of the situation, we believe that the following are germane for use by the Fish and Wildlife Service to make a determination in accordance with the procedures associated with the Rare and Endangered Species Act:

1. There are 37.6 acres within the Phillips site.
2. The site historically has been substantially altered by use as a petroleum storage site, construction of Highway 1, planting of ice plant as ground cover, use of the site as an off-road vehicle area, and unauthorized dumping of various kinds of debris. Off-road vehicle problems continue to be the most destructive force.

3. Project development will occupy, including the access road, about 20.5 acres, i.e., 17 acres will be undeveloped.
4. Within the area to be developed, the present habitat, based on field reconnaissance and interpretation of aerial photographs, is as follows: tank pad sites = 0.70 acres, ice plant coverage - 7.70 acres, areas with hardened oil, pipelines, roads, etc. - 3.30 acres and dune habitat (undisturbed and disturbed) = 7.80 acres. About 65% or about 5 acres of the dune habitat is disturbed.
5. The two species of ice plant now cover about 25% of the entire site and we estimate that the increase in coverage, on the average, is about 0.005% per year.
6. *Eriogonum latifolium* (buckwheat), food source of the Smith's Blue Butterfly is found on the site; coverage is about 0.05% of the site; the percent coverage has not increased since 1981, although there has been an increase in the maturity of the plants since 1981 (we estimate that 38-40% of the plants were mature in 1984). The distribution of this species on the site is very patchy, i.e., generally in small isolated areas.
7. No eggs, larvae or adult Smith's Blue Butterflies were found on the Phillips site during the years 1981-1983. Three pupae were found during July, 1984. Also, during July, 1984, six eggs were found after examination of 166 *Eriogonum latifolium* flowers.
8. The patchy distribution of the *Eriogonum latifolium*, the highly disturbed nature of

- the Phillips site, the continuing opportunity for off-road vehicle damage, the continuing increase in coverage of the site by ice plant, the genetic limitations of the Smith's Blue Butterfly re migration, reduced habitat genetic pressure, etc., all indicate that the Phillips site, without restoration, will not sustain a significant population of Smith's Blue Butterflies. There is a detailed analysis of the genetic problems in Arnold's 1983 paper published in University of California, Entomology, 99: 1-161, and in a 1975 paper by Diamond published in Biological Conservation, 7: 129-146.
9. Habitat restoration is proposed on 10-12.75 acres. This restoration will include restructuring existing dunes, adding new dunes, adding dune vegetation including two species of *Eriogonum*, relocating coast live oak trees, etc. The restoration is planned so that there will be continuity between the restored areas and this will facilitate use by the Smith's Blue Butterfly.
  10. The Restoration Plan includes requirements for both short-term and long-term maintenance. The long-term maintenance requirement is very critical, i.e., most restoration efforts cease after the initial changes have been accomplished and there are no means for assuring the continued success of the restoration efforts.
  11. Based on the work of Arnold, Cooper, Powell, etc. (See references in Restoration Plan for specific citations), the current distribution of the Smith's Blue Butterfly is very patchy. Much of the patchy character, i.e.,

isolated nature, is associated with a series of man-made changes. Therefore, since there is no opportunity to remove the man-made changes, it is appropriate to establish restoration-maintenance efforts within each of the isolated areas. This concept already is being implemented by the California Department of Fish and Game at the mouth of the Salinas river.

12. The Phillips site is adjacent to a piece of property owned by the State of California and administered by the California Department of Parks and Recreation. There is a small triangular area within that property which contains disturbed and undisturbed dune habitat (see the attached photograph). That area will be added to the restoration plan for the Phillips site.

The above is a brief review of the salient points regarding the Phillips site, and the Restoration Plan previously provided contains additional details.

We do not believe that this situation is similar to that in the San Bruno Mountains, i.e., the habitat is highly disturbed, the habitat size is very small, and the use of the habitat by the Smith's Blue Butterfly presently is very low and there is little anticipation that the use of the habitat will increase significantly without the aid of a restoration program. Accordingly, we believe that it should be possible to evolve, in a relatively short time frame a program of review which will satisfy the concerns of the City of Monterey, California Department of Fish and Game, California Department of Parks and Recreation, California Coastal Commission and the Fish and Wildlife Service (FWS). We have discussed the present

FWS process with Ray Arnett, Assistant Secretary Fish & Wildlife and Parks, Department of the Interior, and his staff, and with certain of the staff at FWS Headquarters, Washington, D.C. and it appears that it is possible to proceed [sic] with considerable dispatch to develop a suitable restoration plan, and in turn, obtain an appropriate FWS permit. We urgently request that such an expedited procedure be established.

We will be meeting with the General Planning staff of the California Department of Parks and Recreation on Wednesday, August 1, 1984 to work out the details for adding the small triangle of state property to the Phillips site Restoration Plan. We anticipate that we can have the details ready for your review by August 8, 1984

We will be before the City of Monterey Planning Commission on August 14, 1984 for consideration of the Tentative Tract Map and the related approvals. The City and the Coastal Commission have asked that we proceed as quickly as possible to obtain an answer to the following question:

Is the present dune habitat on the Phillips site such that the appropriate plan of action is to develop a restoration plan?

We are prepared to work closely with you, to provide additional general and technical information, meet with any and all individuals you deem appropriate, so that we can have a general or definitive answer for the City by the August 14, 1984 meeting.

As a suggestion, the following steps/process might be the most efficient:



1. Work with the FWS staff to assemble all the necessary general and technical data.
2. Schedule a meeting with FWS, Coastal Commission, Fish and Game, etc., staff to discuss the situation, review technical and procedural requirements and establish a procedure for timely completion of review of the proposed development and restoration efforts for the Phillips site.
3. Completion by FWS of a preliminary determination on the dune habitat characteristics [sic].
4. Complete the Restoration Plan for the entire habitat area, i.e., Phillips site and the adjacent state property.
5. Review of Restoration Plan by FWS
6. FWS decision re Restoration Plan adequacy re requirements of Rare and Endangered Species Act, etc.

I am sorry that I was unable to attend the meeting with Mr. Varga last Friday. We look forward to your earliest response to this letter. Please call myself or Debra at (714) 632-8521 if was can provide additional details or to establish a schedule for the necessary meetings to work out any problems regarding the project.

Sincerely,

BRIGHT & ASSOCIATES

Original signed by

Donald B. Bright

DBB:vc

Attachments

cc: Bill Wojtkowski, City of Monterey  
 Haywood Norton, City of Monterey  
 Ed Brown, Coastal Commission  
 Joy Chace, Coastal Commission  
 Bruce Elliott, Fish & Game  
 Dick Felty, Parks & Recreation  
 Gunther Boccia, Ponderosa Homes  
 Paul Davis, Davis et al.

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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)

[LOGO]

United States Department of the Interior

FISH AND WILDLIFE SERVICE

SACRAMENTO ENDANGERED SPECIES OFFICE

2800 Cottage Way, Room E-1823

Sacramento, California 95825

AUG 22 1984

Mr. Bill Fell, Planning Services Manager  
City of Monterey  
City Hall  
Monterey, CA 93940

Subject: Restoration Plan for the Phillips Petroleum Site,  
Monterey, California

Dear Mr. Fell:

This is in response to your letter of August 6, 1984 to Mr. Richard J. Navarre regarding the Restoration Plan for the Phillip Petroleum Site in the Del Monte Dunes area of the City of Monterey.

Ponderosa Homes is proposing to construct a residential development on the 37.6 acre Phillips Petroleum Site. The proposed residential development will utilize approximately 19.5 acres of the Phillips Petroleum Site as follows: 4.5 acres for buildings, 4.5 acres for paved streets and 10.5 acres for landscaping. An additional acre of land may be required for a paved access road leading to Del Monte Avenue.

The Dune Restoration Plan associated with the proposed Ponderosa Homes development, dated July, 1984 was prepared by Bright and Associates. The stated goal of the plan is to achieve effective restoration, enhancement and

maintenance of about 10.0 acres of the Phillips Petroleum Site.

Vegetation on the now vacant 37.6 acre site is primarily iceplant. The Restoration Plan indicates that two species of iceplant cover about 25 percent of the site and that the native vegetation includes coast live oak, *Quercus agrifolia*; buckwheat, *Eriogonum latifolium*; silver beach weed, *Ambrosia chamissonis*, several species of lupine, *lupinus* spp.; dune grass, *Poa douglasii*; deerweed, *Lotus scoparius*; and heather golden bush, *Haplopappus ericoides*.

Developments within the coastal sand dunes such as that proposed by Ponderosa Homes represents a permanent loss of dune habitat and would preclude restoration of the entire 37.6 acre site. However, we believe restoration, enhancement and maintenance of 10 of these acres could ameliorate on site adverse impacts to the endangered Smith's blue butterfly, *Euphilotes enoptes smithi* that will result from the development. The fact that the numbers of *Eriogonum latifolium*, the food plant of the Smith's blue butterfly have been increasing is evidence that dune restoration is occurring naturally because this plant requires a dynamic sand dune environment to become established.

In regard to the general goals listed on pages 2 and 3 of the restoration plan, we support those that eliminate the exotic ice plants and those that provide potential habitat areas for the Smith's blue butterfly. We do not necessarily agree with the plans to achieve the goals, especially those involving the removal and replacement of sand and those that control the natural movement of sand. We can also support the plan to prohibit off-road vehicles in the area to protect the Smith's blue butterfly and its food plant.



Plans relating to relocating plants such as *Eriogonum* spp. have little likelihood for success.

Plant types and assemblages of plants to be used as described on pages 11 and 12 seem rather limited when compared to the number of species listed in Table 1. However, only plants native to the site should be used. *Rubus ursinus*, which is not native to the area, should not be used.

We note on page 5, that on July 12, 1984, Smith's blue butterfly were found on the property. Because the Smith's blue butterfly is an endangered species, it is protected by Federal law. Any authorizations by the City, to allow for the Ponderosa Homes development or for the Dune Restoration Plan, that would cause the killing or taking of an endangered animal species are prohibited by the Endangered Species Act of 1973, as amended. We will work with the City and the project proponents to examine this issue if desired.

If you should have any questions regarding this matter, please contact Ralph Swanson of this office.

Sincerely,

/s/ Gail C. Kobetich  
Gail C. Kobetich  
Project Leader

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**UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)**

**CITY OF MONTEREY**

**To:** Community Development Director

**From:** Planning Services Manager

**Date:** August 29, 1984

**Subject:** Phillips Petroleum Site Restoration Plan

Following a series of calls and correspondence between Bright and Associates, U. S. Fish and Wildlife Services and Dr. Richard Arnold, our consultant, I talked to Dr. Arnold on the phone this morning. Dr. Arnold relayed the results of his meeting last night with Don Bright. He said they discussed Dr. Bright's response to City, Fish and Wildlife Service and Dr. Arnolds [sic] comments. They discussed the problems with Dr. Brights [sic] restoration plan and what could be done to resolve them. Dr. Arnold said that at this time he could not recommend approval of Dr. Brights [sic] restoration plan. He would need to see more particulars about the biological aspects of the plan to conclude that the plan was biological sound [sic].

He had specific comments about Dr. Bright's plan. He said the proposed restoration area, seaward of the regional sewer line was not viable. He said the proposed restoration on the East border of the property was doubtfully viable because of its lineal nature. He felt the habitat in the Eastern portion of the site where the three butterfly larva were found July, 1984 should be preserved if possible. While he felt the new road alignment for the Western portion of the site might reduce the impact on the habitat, he was also concerned about it splitting the habitat. Expanding on that point, he felt that even with a good restoration plan the butterflies on this site would be



isolated from other habitat on other sites within their range, and thus would be vulnerable to extinction. He felt that off-site mitigation measures should be explored. He cited other areas, for example Marina, Ft. Ord, the adjacent State property, and the U. S. Naval Postgraduate School property.

Dr. Arnold was skeptical that restoration efforts within the Ponderosa site bowl area would be successful. With the exception of the back dune area, he was skeptical of the restoration feasibility of the East area and again the North area seaward of the sewer line. Don Bright stated in the beginning of his restoration plan that the plan objective was to "achieve effective restoration, enhancement and maintenance of about 10.0 acres on the Phillips Petroleum site." U. S. Fish and Wildlife in their August 22, 1984 letter said that "we believe restoration, enhancement and maintenance of 10 of these acres could ameliorate on site adverse impact to the endangered Smith's blue butterfly." However, none of the agencies nor biological consultants have presented any evidence that 10.0 acres is a minimally acceptable, satisfactory or superior habitat. U.S. Fish and Wildlife's goal of "effective contiguous habitat" is the only reasoned criteria presented to date. If the project is to meet the goal of restoring, enhancing and maintaining effective contiguous habitat, then at least three alternatives come to mind:

1. The position could be taken that the habitat on the back dune is acceptable providing that the applicant secure Coastal permission and U.S. Fish and Wildlife approval of a final restoration plan for that area.
2. The applicant could be asked to revise his plan by removing structures in the Eastern part of the site to

obtain more effective contiguous habitat along that boundary that would meet the approval of the Coastal Commission and U.S. Fish and Wildlife Service.

3. The position could be taken that the the Coastal Commission and U.S. Fish and Wildlife Service address the plan and be responsible for its final approval.

Under Federal law, the U.S. Fish and Wildlife Service is responsible for preserving endangered species like the Smith's blue butterfly. They are supposed to prepare recovery plans for the habitat range of the endangered species. According to Dr. Arnold U.S. Fish and Wildlife has prepared a recovery plan for the Smith's blue butterfly habitat in this region but it has not been approved. Such a plan would prioritize areas for preservation, areas for maintenance and areas that might have joint use. Lacking such a plan, U.S. Fish and Wildlife is understandably trying to preserve every bit of habitat they possibly can. We do not know at this time what quality and how much habitat the U.S. Fish and Wildlife Service would approve. That may not be known until an application is submitted to them by the project proponents.

/s/ Bill  
Bill Fell

Attachments: August 17, Richard Arnold Letter  
August 22, U.S. Fish & Wildlife Service Letter  
August 29, Donald Bright Letter

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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)

CITY OF MONTEREY

To: Community Development Director

From: Senior Planner (Norton)

Date: September 4, 1984

Subject: PONDEROSA HOMES PROJECT SCHEME D  
DATED AUGUST 28, 1984 - CONSISTENCY  
WITH DEL MONTE BEACH LAND USE PLAN  
(LUP)

Ponderosa Homes Scheme D adheres to all policies in the Del Monte Beach LUP with one exception. Scheme D shows the private yard areas of some of the seaward units encroaching upon the regional sewer easement. LUP policy requires that development shall be set back of the regional sewer easement (Policy 10b on page 81 in the Del Monte Beach LUP). To be consistent with the LUP, Scheme D should show no private development encroachment into the regional sewer easement.

Paul Davis, the architect [sic] for Ponderosa Homes, has expressed a concern with the City of Monterey's proposed conditions of approval addressing the preservation of significant habitat areas. Paul's concern is with the word "preserve" which he thinks could be interpreted to preclude restoration of significant habitat areas. In reviewing the conditions I do believe that the intent of conditions 3 and 4 would be clearer if the word preserve was replaced by the word protect. However, if it is too much trouble to change the wording at this late hour, perhaps Paul's concern can be addressed by explaining that the Del Monte Beach LUP habitat protection policies allow for restoration and that proposed conditions 3 and 4 state that

preservation efforts shall be undertaken in line with habitat protection policies in the Del Monte Beach LUP. As long as the conditions reference the LUP policies, I believe Paul's concern is addressed.

/s/ HN

Haywood Norton

c: Planning Services Manager (Fell)

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**UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)  
CITY OF MONTEREY**

**To:** City Manager

**From:** Community Development Director

**Date:** September 7, 1984

**Subject:** SUPPLEMENTAL INFORMATION REGARD-  
ING APPEAL OF PLANNING COMMISSION  
DENIAL OF SITE PLAN AND PLANNED  
UNIT DEVELOPMENT OF 190-UNIT TOWN-  
HOUSE AND CONDOMINIUM DEVELOP-  
MENT AT 2301 DEL MONTE AVE  
(PONDEROSA HOMES)

Recommendation:

That City Council concur with the Staff recommendation that the proposed plan indicated as "scheme D" be approved subject to the conditions and modifications indicated on Revised Exhibit A.

Discussion:

Since the time the original staff report was written for the September 4, 1984 City Council meeting, staff has received additional information regarding this project. This information was going to be given as part of oral testimony at the September 4, 1984 meeting, but since the matter has been continued it has allowed staff to provide this in written form.

Gale Kobetich of the United States Fish and Wildlife in the Sacramento office has indicated to me that he has reviewed the dune restoration plan prepared by the applicant's consultants, but he needs additional information prior to approval. Furthermore he indicated that it

would be completely appropriate to condition any site plan approval upon further review and acceptance by the U. S. Fish and Wildlife Service.

Attached is a memo from Senior Planner Norton regarding the private yard areas encroaching upon the original sewer easement. This is not in agreement with Del Monte Beach LUP adopted by the City of Monterey, and therefore this area will need to be redesigned. Staff has also had time to evaluate the proposal of replacing the six flats in the Northwestern portion of the site with two townhouse units. Due to changes in elevation this does not seem to be an appropriate approach. Another minor concern is regarding conditions of approval which address the preservation of significant habitat areas and particularly the word "preserve" versus the word "protect".

As a result of the forementioned concerns, staff has suggested modifications to conditions 1, 3 and 4. If you or individual Council members have any concerns regarding these revised conditions, or any aspect of this proposed project, please do not hesitate to contact me prior to the September 13, 1984 Council meeting.

/s/ BW  
Bill Wojtkowski



## CITY OF MONTEREY

To: Community Development Director

From: Senior Planner (Norton)

Date: September 4, 1984

Subject: PONDEROSA HOMES PROJECT SCHEME D  
DATED AUGUST 28, 1984 - CONSISTENCY  
WITH DEL MONTE BEACH LAND USE PLAN  
(LUP)

Ponderosa Homes Scheme D adheres to all policies in the Del Monte Beach LUP with one exception. Scheme D shows the private yard areas of some of the seaward units encroaching upon the regional sewer easement. LUP policy requires that development shall be set back of the regional sewer easement (Policy 10b on page 81 in the Del Monte Beach LUP). To be consistent with the LUP, Scheme D should show no private development encroachment into the regional sewer easement.

Paul Davis, the architect [sic] for Ponderosa Homes, has expressed a concern with the City of Monterey's proposed conditions of approval addressing the preservation of significant habitat areas. Paul's concern is with the word "preserve" which he thinks could be interpreted to preclude restoration of significant habitat areas. In reviewing the conditions I do believe that the intent of conditions 3 and 4 would be clearer if the word preserve was replaced by the word protect. However, if it is too much trouble to change the wording at this late hour, perhaps Paul's concern can be addressed by explaining that the Del Monte Beach LUP habitat protection policies allow for restoration and that proposed conditions 3 and 4 state that

preservation efforts shall be undertaken in line with habitat protection policies in the Del Monte Beach LUP. As long as the conditions reference the LUP policies, I believe Paul's concern is addressed.

/s/ HN

Haywood Norton

c: Planning Services Manager (Fell)

Revised  
EXHIBIT A  
September 7, 1984

PROPOSED CONDITIONS OF APPROVAL FOR PLAN  
UNIT DEVELOPMENT FOR CONDOMINIUM PROJECT  
AT 2301 DEL MONTE AVENUE (PONDEROSA HOME)

1. *SITE PLAN* The approved plans shall be in general accordance with scheme D dated August 30, 1984 on file with the Department Community Development ~~with the exception that the 6 flats numbered 65-70 in the Northwestern portion of the site be replaced with two townhouse units of A-3 or of comparable size; with the exception that there be no private development encroachment into the regional sewer easement. Those lots that presently encroach into the regional sewer easement shall be redesigned subject to ARC review and approval. Particular attention shall be given to the redesign of the two most North-westerly lots (lots 93 and 94) to ensure that the redesign does not impact the emergency access or result in substantial changes to the existing land form.~~
2. *PROCESS* Prior to submittal of the tentative map, the applicant shall submit sufficient detailed plans

for concept review and approval by the Architectural Review Committee. Submittal of the tentative map shall be in substantial compliance with the conceptual [sic] approval of the Architectural Review Committee.

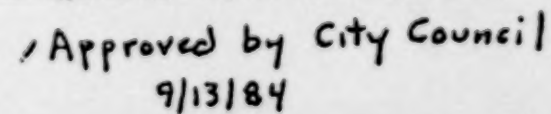
3. **SMITH'S BLUE BUTTERFLY** Prior to final map or any construction, which ever occurs first, the developer shall ~~preserve~~ *protect* the existing habitat, in line with habitat protection policies in the Del Monte Beach Land Use Plan. The habitat preservation shall be reviewed *and approved* by California Department of Fish and Game and U.S. Fish and Wildlife Service and the City of Monterey. Any significant changes to the site plan as a result of that review will require an approval by the City of Monterey and may require resubmittal of tentative map.
4. **RARE AND ENDANGERED PLANTS** All rare and endangered plants shall be ~~preserved~~ *protected* in line with the habitat protection policies in the Del Monte Beach Land Use Plan. The rare and endangered plant preservation program shall be reviewed by the California Native Plant Society, and approved by the City of Monterey.
5. **ACCESS** All vehicular accessways shall be in accordance with the Department of Public Works and the Fire Department. The main street access as well as the parking areas for beach access shall be dedicated to the City of Monterey. Specific designs of the boardwalks for public access shall be reviewed and approved by the Architectural Review Committee.
6. **FENCING** Architectural Review Committee shall evaluate the entire site to determine what portions shall be fenced. The style of materials and location shall be reviewed and approved by the ARC.

7. **GRADING** All grading shall satisfy [sic] the requirements of ~~the~~ Department of Public Works. The natural contour of the land shall be followed as much as possible.
8. **UTILITIES** All utilities shall be underground except as otherwise approved by the Planning Commission.
9. **FIRE DEPARTMENT REQUIREMENTS** Applicant shall comply with the requirements of the Fire Department including but not limited to the provision of an adequate number of fire hydrants, and ~~protection~~ of trash enclosures.
10. **PUBLIC WORKS DEPARTMENT REQUIREMENTS** Applicant shall comply with the requirements of the Public Works ~~Department~~.
11. **HOMEOWNERS ASSOCIATION** The Homeowners Association Agreement ~~shall~~ be reviewed and approved by the City Attorney as an effective and economically feasible means of operating the association. The developers shall secure a letter and report from the lending institution or Office of State Real Estate Commissioner assuring the City that the monthly maintenance fee to be charged the homeowners is sufficient to guarantee an appropriate level of maintenance and operation. It shall be the Homeowners Association responsibility to maintain the public access road clear of sand and to replace any trees which are removed in accordance with the City's ordinance.
12. **SOUNDPROOFING BETWEEN UNITS** Each unit shall be appropriately soundproofed between units to provide privacy for each family. The developer shall conduct an acoustical analysis of the structural design of the residential buildings and incorporate structural mitigations to reduce interior noise as recommended in that analysis.

13. *PARK DEDICATION FEE* Per the recommendation of the Park and Recreation Department no park dedication fee shall be required. However the applicant will be required to dedicate an open space easement to the City of Monterey on the back dune slope (the area facing Del Monte Avenue from the units to the City of Monterey right-of-way). Furthermore the applicant shall be required to dedicate an open space easement to the City of Monterey on the property seaward of the development line as shown on scheme D.
14. *AFFORDABILITY AGREEMENT* Applicant shall comply with Ordinance 2416 and Resolution 82-16, regarding moderate income housing.
15. *EXPIRATION* This Use permit is valid for a period of 18 months, during which time the applicant shall be responsible for obtaining concept approval by the ARC and approval of the tentative map in accordance with condition 2.

\*Revised from earlier report





BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)

MAYOR:  
Clyde Roberson

COUNCIL MEMBERS:  
Dan Albert  
Theresa Canepa  
Richard Hughett  
Ruth Vreeland

CITY MANAGER:  
John Dunn

MINUTES OF MEETING:

Meeting was called to order by Mayor Roberson  
who led in the Pledge of Allegiance.

PRESENT: COUNCIL MEMBERS: ALBERT, CANEPA, VREELAND,  
ROBERSON

ABSENT: COUNCIL MEMBERS: HUGHETT

STAFF City Manager, City Attorney, City Clerk,  
PRESENT: Assistant City Manager, Parks and Recre-  
ation Director, Public Facilities Director,  
Personnel Director, Police Chief, Community  
Development Director, Fire Chief, Public  
Works Director

Mr. Cimarron Conway withdrew his request to hold  
a Seafare '84 and Arts and Crafts Festival on  
Wharf II.

ROLL CALL  
HUGHETT ABSENT

NEW BUSINESS

Proposal by the Cimarron Group  
to hold a Seafare '84 and  
Columbus Weekend Arts &  
Crafts Festival on Wharf 2  
October 6 and 7, 1984

PUBLIC HEARINGS

Following Staff Presentation, Mayor Roberson opened  
the Public Hearing. Speaking in support of the  
Appeal was Mr. Gunther Boccia of Ponderosa Homes.  
Speaking regarding the proposed Restoration Plan  
for the Phillips Petroleum Site was Dr. Donald  
Bright, of Bright and Associates. Speaking in  
opposition to the appeal were Mr. Ron Bostwick,  
Dei Monte Beach Property Owners Association,  
and Mr. Carl Larson, Sierra Club Monterey County  
Task Force. There being no further speakers,  
the Public Hearing was closed.

Motion of Albert to grant the appeal, approve  
"Scheme D" (document entitled "Ponderosa Homes-  
Area Comparison), subject to the modifications and  
conditions indicated on "Exhibit A" (document en-  
titled "Proposed Conditions of approval for Plan  
Unit Development for Condominium Project at 2301  
Del Monte Avenue-Ponderosa Homes" dated August 30,  
1984) was not seconded.

2301 Del Monte Avenue - Appeal  
of Planning Commission Denial  
of Proposed Site Plan and  
Planned Unit Development for  
190 Unit Townhouse and Condo-  
minium Development (Ponderosa  
Homes)

9/13/84

-1-



Motion of Vreeland to continue the matter to October 16 pending a response from the Fish and Wildlife Service regarding the proposed Restoration Plan for the site was not seconded.

On Motion Vreeland, seconded by Canepa and carried by the following Roll Call vote, it was moved the Appeal be granted, that the Council approve the maximum density of 190 units, that the proposed access routes be approved, and that a response from the Fish and Wildlife Service be obtained prior to the Architectural Review Committee and Planning Commission's final approval of the Tentative Map for the development.

AYES: COUNCIL MEMBERS: CANEPA, VREELAND, ROBERSON  
NOES: COUNCIL MEMBERS: ALBERT  
ABSENT: COUNCIL MEMBERS: HUGHETT

Mayor Roberson asked that his concerns regarding the view corridors, the proposed public parking areas, the restoration plan and a possible 15% reduction in total site coverage to correspond with the 15% reduction in overall density of the project be considered throughout the Architectural Review Committee and Planning Commission's review of the development.

On Motion Vreeland, seconded by Canepa and carried by the following Roll Call vote, it was moved the Ordinance Accepting Leasehold Improvements from Gino's Restaurant on Wharf 1 be Passed to Print:

AYES: COUNCIL MEMBERS: ALBERT, CANEPA, VREELAND, ROBERSON

NOES: COUNCIL MEMBERS: NONE

ABSENT: COUNCIL MEMBERS: HUGHETT

On Motion Roberson, seconded by Canepa and carried by the following Roll Call vote, it was moved the Ordinance Adjusting Compensation for Battalion Chiefs Management Association for Fiscal Year 1984-1985 be passed to print:

AYES: COUNCIL MEMBERS: ALBERT, CANEPA, VREELAND, ROBERSON

NOES: COUNCIL MEMBERS: NONE

ABSENT: COUNCIL MEMBERS: HUGHETT

On Motion Vreeland, seconded by Canepa and carried by the following Roll Call vote, it was moved the Council proceed with Greater Technical Orientation and Involvement in the City's Computer Program and that a Study Session be set aside for a presentation.

9/13/84

-2-

RESOLUTION NO. 84-160  
Appeal Granted subject to  
Conditions

59

#### ORDINANCES - FIRST READING

Ordinance Accepting Leasehold Improvements from Gino's Restaurant on Wharf 1

Passed to Print

Ordinance Adjusting Compensation for Battalion Chiefs Management Association for Fiscal Year 1984-1985

Passed to Print

#### UNFINISHED BUSINESS

Possible Designation of City Council Subcommittee relating to City Computer System



**UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)**

**RESOLUTION NO. 84-160 C.S.**

**RESOLUTION GRANTING APPEAL FROM DENIAL  
OF SITE PLAN; PONDEROSA HOMES CONDO-  
MINIUMS, 2301 DEL MONTE AVENUE**

---

WHEREAS, the Planning Commission having previously denied the proposed site plan for a 190 unit condominium project at 2301 Del Monte Avenue, the City Council did entertain an appeal therefrom; and

WHEREAS, the City Council does find that the site plan as proposed is conceptually satisfactory and is in conformance with previous decisions of this Council regarding density, number of units, location on the property, and in other respects;

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF MONTEREY that the decision of the Planning Commission denying the site plan for this development is hereby overruled, and the site plan know as scheme D dated August 30, 1984, is hereby approved subject to the conditions of approval attached hereto and incorporated by the reference as Exhibit A.

PASSED AND ADOPTED BY THE COUNCIL OF THE CITY OF MONTEREY this 13th day of September, 1984, by the following vote:

AYES: COUNCILMEMBERS: Canepa, Vreeland, Roberson

NOES: COUNCILMEMBERS: Albert

ABSENT: COUNCILMEMBERS: Hughett

---

APPROVED:

/s/ CLYDE ROBERSON  
Mayor of said City

ATTEST:

/s/ P. L. O'HEARN  
PATRICIA L. O'HEARN  
City Clerk thereof

Revised  
EXHIBIT A  
September 13, 1984

CONDITIONS OF APPROVAL FOR PLAN UNIT DEVELOPMENT FOR CONDOMINIUM PROJECT AT 2301 DEL MONTE AVENUE (PONDEROSA HOME)

1. SITE PLAN The approved plans shall be in general accordance with scheme D dated August 30, 1984 on file with the Department of Community Development with the following exceptions:
  - a. There be no private development encroachment into the regional sewer easement. Those lots that presently encroach into the regional sewer easement shall be redesigned subject to review and approval by the Architectural Review Commission. Particular attention shall be given to the redesign of the two most north-westerly lots (Lots 93 and 94) to insure that the design does not impact the emergency access or result in substantial changes to the existing land form.
  - b. The Planning Commission shall evaluate and determine whether additional public parking should be provided. As part of this evaluation the Commission shall consider increasing the existing public parking areas; indicated on

Scheme D providing parking on the North-South public street within the proposed right-of-way or by widening this road; or by changing a portion of the private streets to public streets with on-street parking.

- c. The maximum total floor area (without garages) is 236,760 square feet. The Planning Commission shall review and consider the alternatives of reducing this total floor area to approximately 222,163 square feet, which is a 15% reduction from the total floor area in the 224 unit plan.
  - d. The Planning Commission shall evaluate the alignment of the view corridors in order to increase the view potential.
2. PROCESS Prior to submittal of the tentative map, the developer shall submit sufficient detailed plans for concept review and approval by the Architectural Review Committee. Submittal of the tentative map shall be in substantial compliance with the conceptual approval of the Architectural Review Committee and with any changes resulting from the modifications in Condition 1.
  3. SMITH'S BLUE BUTTERFLY Prior to submittal of the tentative map the developer shall protect the existing habitat [sic], in line with habitat protection policies in the Del Monte Beach Land Use Plan. The habitat preservation shall be reviewed and approved by California Department of Fish and Game and U.S. Fish and Wildlife Service and the City of Monterey. Any significant changes to the site plan as a result of that review will require an approval by the City of Monterey and may require resubmittal of tentative map.
  4. RARE AND ENDANGERED PLANTS All rare and endangered plants shall be protected in line with the



habitat protection policies in the Del Monte Beach Land Use Plan. The rare and endangered plant preservation program shall be reviewed by the California Native Plant Society, and approved by the City of Monterey.

5. ACCESS All vehicular accessways shall be in accordance with the Department of Public Works and the Fire Department. The main street access as well as the parking areas for beach access shall be dedicated to the City of Monterey. Specific designs of the boardwalks for public access shall be reviewed and approved by the Architectural Review Committee.
6. FENCING Architectural Review Committee shall evaluate the entire site to determine what portions shall be fenced. The style of materials and location shall be reviewed and approved by the ARC.
7. GRADING All grading shall satisfy the requirements of the Department of Public Works. The natural contour of the land shall be followed as much as possible.
8. UTILITIES All utilities shall be underground except as otherwise approved by the Planning Commission.
9. FIRE DEPARTMENT REQUIREMENTS Applicant shall comply with the requirements of the Fire Department including but not limited to the provision of an adequate number of fire hydrants, and protection of trash enclosures.
10. PUBLIC WORKS DEPARTMENT REQUIREMENTS Applicant shall comply with the requirements of the Public Works Department.
11. HOMEOWNERS ASSOCIATION The Homeowners Association Agreement shall be reviewed and approved by the City Attorney as an effective and

economically feasible means of operating the association. The developers shall secure a letter and report from the lending institution or Office of State Real Estate Commissioner assuring the City that the monthly maintenance fee to be charged the homeowners is sufficient to guarantee an appropriate level of maintenance and operation. It shall be the Homeowners Association responsibility to maintain the public access road clear of sand and to replace any trees which are removed in accordance with the City's ordinance.

12. SOUNDPROOFING BETWEEN UNITS Each unit shall be appropriately soundproofed between units to provide privacy for each family. The developer shall conduct an acoustical analysis of the structural design of the residential buildings and incorporate structural mitigations to reduce interior noise as recommended in that analysis.
13. PARK DEDICATION FEE Per the recommendation of the Park and Recreation Department no park dedication fee shall be required. However the applicant will be required to dedicate an open space easement to the City of Monterey on the back dune slope (the area facing Del Monte Avenue from the units to the City of Monterey right-of-way). Furthermore the applicant shall be required to dedicate an open space easement to the City of Monterey on the property seaward of the development line as shown on scheme D.
14. AFFORDABILITY AGREEMENT Applicant shall comply with Ordinance 2416 and Resolution 82-16, regarding moderate income housing.



15. EXPIRATION This Use permit is valid for a period of 18 months, during which time the applicant shall be responsible for obtaining concept approval by the ARC and approval of the tentative map in accordance with condition 2.
- 

**UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.E.)**

cc: Haywood - pls review

[LOGO]  
United States Department  
of the Interior

Fish and Wildlife  
Service  
Lloyd 500 Building,  
Suite 1692  
500 N.E. Multnomah  
Street  
Portland, Oregon 97232

In Reply Refer To:  
Your Reference:

March 22, 1985

Mr. Virgle Cockrum  
Loan Guaranty Division  
Veterans Administration  
211 Main Street  
San Francisco, California 94105

Subject: Interagency Endangered Species Consultation,  
Home Loan Guarantees, Del Monte Dunes of  
Monterey, Monterey County, California (1-1-85-  
F-15)

Dear Mr. Cockrum:

This Biological Opinion is in response to your December 11, 1984, request for formal consultation pursuant to Section 7 of the Endangered Species Act of 1973, as amended. The proposed action would provide federal home loan guarantees for the purchase of newly built condominiums in the city of Monterey, Monterey County, California. The proposed location, known as the Phillips Petroleum site, is part of the historic Monterey Sand Hills dune system that supports habitat for the endangered Smith's blue butterfly, (Euphilotes enoptes smithi) (SBB).

We have studied the applicant's Environmental Impact Report, dated January 27, 1982, which evaluates a much larger and considerably different housing scheme than presently proposed. A recent report titled *Restoration Plan for the Phillips Petroleum Site, Del Monte Beach, Monterey, California* dated July, 1984, prepared by Bright and Associates outlines a concept for sand dune and native plant restoration including replanting species beneficial to SBB. Our recent draft Recovery Plan for SBB, other published literature, and a considerable volume of correspondence with knowledgeable experts in the field of entomology also assisted us in the preparation of this Biological Opinion. A complete administrative record is on file at our Sacramento Endangered Species Office.

Several meetings between our Service and the applicant's representatives have been held since summer 1984. On June 27, 1984, and February 25, 1985, Service representatives toured the project site to increase our understanding of the proposal and its impacts on endangered species.

#### Biological Opinion

It is our Biological Opinion that approval of federal home loan guarantees is not likely to jeopardize the continued existence of the Smith's blue butterfly.

#### Description of the Proposed Action

The federal government proposes to back home loans for qualifying U.S. military vetrans [sic] for a portion of the 190 condominiums to be built on the Phillips site. Veterans Administration typically guarantees, insures or

privides [sic] direct funding up to a ceiling amount of \$27,500 to allow vetrans [sic] to obtain home loans at a moderate interest rate, a long amortization period, and often without down payment. VA currently has only a conceptual plot plan of the condominium proposal. Extensive additional review within VA will be required, particularly architectural design reviews, prior to final approval of loan guarantees.

Condominiums are proposed on the 37.6 acre former Phillips Petroleum tank storage area at the intersection of Del Monte Avenue and State Highway #1. The site was abandoned in the 1940's and all facilities, save for a few buildings along Del Monte Avenue, removed. Several large oiled tank pads, a remnant perimeter road; and minor debris also remain on the site. The property will be entirely bulldozed to install roads and utilities, and to construct housing on 20.5 acres of the site. The applicant proposes to restore about 10 acres of native sand dune ecosystem and create conditions favorable to SBB primarily along the high back dune facing Del Monte Avenue and, secondarily, along the north edge of the property that abuts the State Parks parcel (Bright and Assco. 1984). Iceplant, which now largely carpets the dunes particularly along Del Monte Avenue, would be removed (in stages) and sand "dunes" would be structured or contoured from existing sand. Assembledges [sic] of native dune plants, including host plants for SBB, would be planted and maintained. The sand dune restoration program is tentatively scheduled to be bonded and started prior to other construction on the property (Bright, pers. comm.). The applicant had initially secured at least tentative



agreement with the California Department of Parks and Recreation to utilize adjacent State Parks property in the restoration scheme. That proposal, however, is no longer viable.

The Phillips Petroleum site is within the Del Monte Beach Land Use Plan area (California Coastal Act) presently in preparation at the City of Monterey. The California Coastal Commission has twice denied certification of the LUP based, in part, on objections to the primary access design for this condominium development and associated environmental impacts (California Coastal Commission 1984).

#### Species Account

Species of *Euphilotes* are widely distributed from the Rocky Mountains (to 3,350 meters) to the Pacific coast, typically inhabiting sand dunes and rocky hillsides in close association with the larval food plant, *Eriogonum* (Arnold 1983). Langston (1975) reports considerable variation in *Eriogonum* host preference, climatic influence, size, color and wing spot pattern.

Mattoni (1954) originally described the subspecies *Euphilotes enoptes smithi* from Burns Creek, Highway #1, Monterey County. The Recovery Plan lists 7 known coastal sand dune and 12 cliff/chapparral localities [sic] for SBB (USFWS 1984). While it was long thought limited to Monterey County coastal sand dunes, Smith's blue butterfly colonies have now been confirmed at some inland sites of ancient beach sands (Zayante Sand Hills, Santa Cruz County) and serpentine grasslands (San Mateo

County). The Recovery Plan currently lists 2 sand parkland and 2 serpentine grassland locations (USFWS 1984). These discoveries extend the recognized distribution of SBB. Furthermore, Emmel and Emmel (1973) have noted "near" *smithi* individuals further south in Santa Barbara and Ventura Counties. Taxonomic studies will probably be required to differentiate these populations correctly. It is likely that additional populations of the species will be found.

Arnold (1983) has contributed most to our understanding of the life history of SBB as a result of his work on coastal dune populations at Ft. Ord, Monterey County, about two miles north of the Phillips site. Variations among, and within, colonies are known, but we believe conclusions drawn from Ft. Ord studies are applicable. The following life history synopsis is largely from from [sic] Arnold's work.

Typically, SBB maintains a close affinity for its sole nectar sources and larval food plants, *Eriogonum latifolium* and *E. parvifolium*. Distribution of the host buckwheats in California is more extensive than that of SBB (USFWS 1984). Females deposit eggs directly on or in the flowering heads of the two *Eriogonum*. Females may select older, larger plants as a strategy to maximize survival (Arnold 1982). Eggs hatch in 4-8 days and larvae begin feeding on the flower parts. By late September larvae crawl to the base of the host plant to pupate in the leaf litter.

Adults emerge in June and July, and as late as mid-September. Arnold has noted that emergence at Ft. Ord sites appears to be closely synchronized with the peak flowering period of the host plant. Females live about 5-9



days while males fly for only 2-7 days. A staggered emergence results in a flight period totalling about 40 days.

The total daily population at Ft. Ord study sites never exceeded 1,065 individual adults during 1977-1979 field work, but densities of 139 females/hectare and 215 males/hectare *Eriogonum* habitat were recorded. Suitable habitat for the SBB often occurs as isolated clusters, but within its habitat the species may be densely distributed.

The adult SBB is totally occupied with nectaring, perching, mating and egg laying. Movement (vagility) and dispersion are limited. At Ft. Ord, SBB females stayed within a mean of 1.3 hectares while the males exhibited even more restricted behavior (0.9 hectares). Only 25% of marked individuals moved more than 70 meters. Females traveled the furthest, a maximum of 226 meters. The longest translocation recorded for males was 144 meters.

Coastal dune habitats are primarily threatened by highway construction, military activities, recreation and urbanization. Planting stabilizing ground cover, especially exotic iceplants (*Mesembryanthemum edule* and *M. chilenses*) reduces natural sand dune dynamics that favor *Eriogonum* presence a vigor (Arnold 1983). Foot traffic, off-road vehicle traffic, and commercial sand mining are also threats to both coastal and inland colonies (USFWS 1984). Sand dune habitats are among the most fragile. More than half the native sand dune acreage in Monterey County has been destroyed (Powell 1978).

Former use of the project site as a petroleum tank farm has resulted in almost complete alteration of the historic

sand dunes. Tank pads cover 0.7 acres, iceplant - 7.7 acres, oil/debris - 3.3 acres, and remnant dunes - 7.8 acres (Bright and Assoc. 1984). *Eriogonum latifolium*, however, is clearly reinvading the site and increasing its numbers and biomass (Arnold 1982, Bright and Assoc. 1984). Presently there are about 1000 individual *E. latifolium* covering 1.88 acres or 5% of the site.

Searches for SBB on the Phillips property have been conducted annually since 1981 (Bright and Assoc. 1984) without success despite Arnold's (1982) collection of SBB adults and larvae from *E. parvifolium* along the railroad tracks on adjoining land, and identifications 1500 feet from the property line at the Laguna del Rey outlet (Yor, pers. comm.). The EIR claimed SBB do not use *E. latifolium* at this site (Earth Metrics 1982). In July 1984, three larvae believed to be SBB, were sighted on *E. latifolium* on the Phillips site. No collections were made but descriptions relayed to knowledgeable entomologists indicate that at least one was *smithi* (Bright, pers. comm.). The other larvae may have been the acmon blue (*Icaricia acmon*), known to be present at other SBB sites (Langston 1975), or other allied blue butterflies (Anon.). Even experienced experts find it difficult to distinguish species at the larval stages (Arnold, pers. comm.). Subsequently, a single SBB adult was observed on the State Parks parcel immediately to the north (Bright 1984).

#### Analysis of the Proposed Action

All 7.8 acres of disturbed and undisturbed remnant sand dunes on the site will be destroyed for housing construction. Construction of the back row of condominiums and

back two streets will completely destroy the existing 1.88 acres (1000 plants) of *E. latifolium* and all SBB (adults, eggs, larval stages, pupae) that may be supported by this habitat. It is impossible to estimate the numbers of SBB currently on the property due to the difficulty of locating and correctly identifying sub-adult stages. Thus we cannot quantify project impacts on individuals of the species. Installation of houses, paved streets, sidewalks, parking areas and exotic landscaping, including probably ice-plant, will doubtless preclude re-invasion of the housing area proper by *E. latifolium* or SBB.

Future productivity of the site as SBB habitat will also be foregone. Even isolated islands of *Eriogonum* can support relatively dense populations of SBB. If we apply Arnold's densities at Ft. Ord, the Phillips site (0.76 hectares) could, assuming no expansion of *Eriogonum*, support 105 females and 163 males. Since buckwheat has increased rapidly in the last few years (and presumably will continue to do so), the potential to support SBB is probably much greater than these estimates suggest. Given its size, habitat quality (albiet [sic] degraded) and location the Phillips site has the potential to support larger populations of SBB if left undeveloped. Enhancement actions to retard iceplant would be desirable and probably even required to achieve full habitat potential.

We must dismiss arguments that the site could not or does not support SBB (Earth Metrics 1982). Such statements reflect a 1981, or earlier, cursory evaluation of habitat conditions when only 65 plants were counted on the site (Arnold 1982). Lack of SBB sightings during annual searches from 1981-83 would, of course, tend to support this conclusion. We have little confirming data on

the scientific rigor of any searches for SBB on the site. However, we are prepared to accept that even moderately conscientious [sic] search surveys during mid-June to mid-September in the vicinity of *Eriogonum* (which has been accurately mapped) would have at least resulted in some sightings of SBB.

Insect species represent such obscure, complex ecological entities that accurate assessments of habitat quality and utilization cannot be derived from one or even a few field examinations.

Neither is the information available on the occurrence of SBB larvae on the site particularly scientific. No examinations were conducted by entomologists with the experience and knowledge to identify the specimens. Conclusions were drawn only from second hand descriptions. Nevertheless, this represents the best scientific information available and we are again prepared to accept the conclusions that at least one larva sighted on *E. latifoium* on the Phillips site was SBB.

Despite the lack of scientific quantifications we would otherwise prefer, the scattered facts fit a pattern that we believe to be characteristic of the ecology and behavior of some rare blue butterflies of California. Host plants, typically short-lived, pioneer species adapted to exploit areas of surficial disturbance or unstable conditions (i.e. steep topography, erosion, shifting sands), become established on a site. Initially they can not support the lepidopteran species of interest. With increasing plant biomass, and a reasonably local population of the butterfly, first a few, then many individuals are supported on the site. With increasing age and senescence of the host



plant, the butterfly population declines, then may disappear altogether as exotic plant species become dominant or recruitment of new host seedlings is otherwise precluded. This dynamic ecosystem interrelationship results in butterfly "hot spots" (Thomas Reid Assoc. 1982) analogous to the the [sic] island clustering of the host plant itself. Some Ft. Ord study plots that were productive in 1979 are, today, little utilized by SBB (Arnold 1983).

The increasing number of buckwheat plants on the Phillips site is indicative of the "invasive phase" of the host plant. Arnold contends it may take seven years for host plants to achieve sufficient biomass to support SBB (Arnold 1982). By 1984 plants may have been robust enough to support at least a few immigrant SBB (Arnold 1984). Even if valid, the strategy of selecting larger host plants on which to lay eggs is undoubtedly not infallible [sic]. Thus SBB females may lay some eggs on buckwheat that is too young to support larvae, with larval starvation the result. Heavy parasitism of larvae is known (Arnold 1983) and could conceivable [sic] extirpate tiny colonies until a sufficient number of larvae survive to complete their life cycle. The one (or three) larvae collected in 1984 could represent early colonization by SBB that, given time, would develop into a vigorous population.

Bright's sighting of a Smith's blue on State Parks property and Arnold's collections of SBB from *E. parvifolium* indicate the probable sources of these early colonizations. Adults are attracted to both host plants where they grow in proximity to one another (Langston 1975). Despite limited vagility of SBB adults, the *E. parvifolium* is only about 120 meters from the nearest larval collection (coincidentally, the one believed to be SBB), well within the

flight capability of SBB. Most SBB movement at Ft. Ord colonies was from west to east and attributable to strong onshore winds (Arnold 1983). Such a barrier may also be functioning at the Phillips site. The high back dune separating the *E. latifolium* from the *E. parvifolium* on Del Monte Avenue may also be an obstacle to SBB movements. In our view such barriers would only slow, not stop, SBB dispersion. After 40+ years of abandonment, the SBB appears to be reclaiming the Phillips site. We would expect this trend to continue along with competition from the encroaching iceplant. Arnold (1983) has theorized two separate "host races" of SBB, one adapted to *E. latifolium* and one adapted to *E. parvifolium*. With time (thousands of years) the two races could become reproductively isolated and, thus, eventually be considered separate species (sympatric speciation). Such a theory may be consistent with the variations in morphology, and ecology of *Euphilotes* species, and the varying host buckwheat preferences noted at inland SBB colonies (USFWS 1984). Ecological, even behavioral differences are often utilized by taxonomists to differentiate species and subspecies. At this time such a hypothesis cannot be confirmed and we must conclude that "latifolium" SBB are not reproductively isolated from "parvifolium" SBB. Arnold (1984) essentially concurs. Thus SBB on adjacent properties probably have and will continue to colonize the Phillips site absent development.

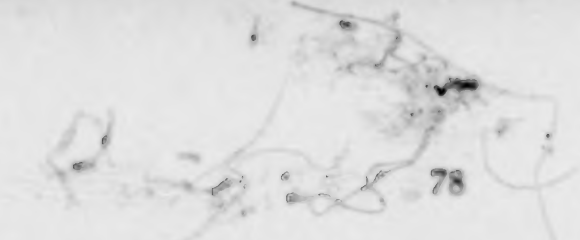
Another mystery of lepidopteran population dynamics relates to the interrelationship of established colonies. Isolated colonies cannot survive without continuous recruitment of vigorous new host plant seedlings. Extirpated colonies can be re-established by immigration of



new individuals from nearby habitats (Murphy and Ehrlich 1980). Genetic integrity of species is maximized by interbreeding and exchange of adults among colonies. With low vagility, colonies must necessarily be in proximity to one another.

Barriers to interchange have been examined (Thomas Reid Assoc. 1982). Generally, narrow roads, low shrubs and narrow stretches of unsuitable terrain are not insurmountable. Greater distances can be traversed if butterflies can reach intermediate islands of habitat. Loss of the Phillips site may interrupt whatever genetic exchange may be occurring between adjacent SBB colonies. Considering that successful, confirmed SBB collections were made only from the railroad right of way next to Del Monte Avenue (off the Phillips site), it is possible that any active interchange of adult SBB occurred through [sic] that corridor and did not involve utilization of the Phillips site proper. The 1984 SBB larvae, even in small numbers, from the Phillips site casts some doubt on even this tentative conclusion.

The importance of the Phillips site in relation to other nearby SBB colonies involves questions of population dynamics we can only speculate on at this time. There is no doubt however in our view that the Phillips site, left undeveloped, would soon become an active pathway for genetic interchange. Its size, location and the presence of additional habitat on the adjacent State Parks property support this view. The effect of the loss of the Phillips site on nearby SBB colonies is speculative at best. There simply has not been sufficient basic research conducted with this species to clarify this issue.



Though it will have adverse impacts on SBB by destroying existing habitat and foreclosing the possibility of future long term productivity for the species, we are unable to conclude that loss of the Phillips Petroleum site will threaten the survival and recovery of the species as a whole. The numbers, distribution, and/or range of the species are not likely to be appreciably reduced with this action. Survey information indicates that utilization of the site by SBB is low at present. The existence of many other populations, both coastal and inland, and the probability that undiscovered colonies are extant militate against paramount concern for the Phillips site.

The restoration plan for the site, while only conceptually outlined at present, has little chance for long term success in our opinion. While such schemes appear feasible in design, they are extremely expensive, long term propositions and, to our knowledge, none have been particularly successful from a biological point of view. Individual species can be emphasized with at least initial success, but the sand dune ecosystem as a whole is too complex to recreate and maintain on a large scale.

Our efforts to plant buckwheat seedlings at our Antioch Dunes National Wildlife Refuge have met with limited results. Extremely high mortality of seedlings and constant encroachment of exotic weed species has negated much of our effort. Moreover, we have not been able to sustain a sufficient annual program of outplantings. Our program at Antioch Dunes NWR cannot be considered a successful "restoration" program.

A sand dune restoration effort, following installation of the regional sewer line along the front of the Phillips site,

has yeilded [sic] some regrowth of mostly exotic trees and grasses. Snow fences have trapped some sand to maintain a naturally appearing topography. While the limited objectives of that plan (Richard Murray Assoc. 1981) were essentially achieved, the emphasis was on exotic plant species and heavy irrigation, hardly natural sand dune ecosystem elements.

There is no question that the applicant can clear out some iceplant from the back dune and replant buckwheat seedlings during intensive initial efforts and expenditure of funds. However, any effort that will be of benefit to SBB will take a minimum of seven years of constant battle against the forces of seedling mortality, encroachment of iceplant and the vagaries of SBB behavior. Unfortunately, condominium construction will have destroyed all the existing SBB resource in the vicinity and there will be no proximal SBB population to recolonize even the most robust areas of buckwheat restoration. From an endangered species standpoint, even the most successful restoration will have to await the chance immigration of SBB or artificial translocation of egg-bearing females.

The increased traffic, possible construction on adjacent property and the inevitable presence of people, pets and perhaps ORV will reduce, if not negate, the effectiveness of any restoration. Routing the access road through the restoration area will undoubtedly bring a call for stabilization of sand to prevent drifting over the roadway. This of course is counter to the need for open, shifting sand favored by the host buckwheats.

The greater chance for success in any restoration plan would involve redesigning the construction to preserve at

least some of the existing *Eriogonum*. A vigorous restoration effort, preferably [sic] linked to enhancements on adjacent State Parks property would still be required. Notable examples of construction redesigns to protect endangered butterfly habitats include San Bruno Mountain housing (San Mateo County) and Gullwing Inn in Marina. Neither project suffered substantial loss of units or economic viability while contributing to the chances for survival and recovery of endangered species.

#### Cumulative Effects

Cumulative effects are those adverse impacts to the species of concern from other state and private actions that are reasonably certain to occur prior to completion of the subject federal activity. An action is "reasonably certain" to occur if it requires the approval of local government or land use agencies and such agencies have essentially approved those actions. Activities not requiring local government approvals must be essentially ready to proceed.

A number of both state and private activities have been identified that will adversely affect SBB. It is uncertain whether they will be completed prior to completion of Del Monte Dunes condominiums because of extensive local and state government approval processes. None that we have identified have received final approvals from local regulatory agencies and therefore they cannot be considered cumulative to this action.



### Biological Opinion

It is our Biological Opinion that approval of federal home loan guarantees for the Phillips Petroleum site is not likely to jeopardize the continued existence of the Smith's blue butterfly.

### Incidental Take

Section 9 of the Endangered Species Act prohibits any taking of listed species without specific exemption. Under the terms of Sections f(b)(4)iii and f(o)(2), taking that is incidental to and not intended as a part of an agency action is not considered taking within the bounds of the Act, provided such taking is in compliance with any terms and conditions stipulated in a biological opinion.

In such instances our Service will provide a statement specifying the extent and impact of incidental taking along with measures we consider necessary to minimize such taking. Based on the characteristics of the species, results of field surveys and the questionable taxonomy of larvae, we believe incidental take will be impossible to identify or measure but will occur though minor. It is our opinion that given the present circumstances, numerical losses will be small and of little consequence to the species as a whole. As such we have no term and conditions to offer that will minimize such taking.

In furtherance of the purposes of the Endangered Species Act (Sections 2(c) and 7(a)1) which mandates federal agencies to utilize their authorities to carry out programs for conservation of listed species, we recommend that the

project be redesigned to preserve at least the larger colonies of host buckwheat in the east corner of the property. Thus development should be restricted to the area west of Seafoam Street. This would best assist conservation of the species on site and improve the chances for success of any restoration. Local and state government land use agencies will continue to review and evaluate the design for housing on the site.

Access to the development has been a point of contention during local planning for the site. The greatest benefits to SBB would derive from designing a different access scheme that would avoid entrance across the back dune. This could allow for more isolation and thus protection (via fencing) for areas where restoration is proposed. Access from Tide Street on the west and Dunes Drive, through the State Parks parcel on the east have been considered but both have legitimate drawbacks. The State Parks Department is currently beginning a general planning process for its Monterey parcel which will undoubtedly include upgraded road access. We believe a workable access route through the State Parks land should continue to be pursued as the least impacting to SBB.

This concludes formal consultation on this project. If the proposal is significantly modified or if new information becomes available on listed species or impacts to listed species, reinitiation of formal consultation with our Service should be considered. Specifically, should the development not qualify for VA programs, or should the development voluntarily drop out of the program, this Biological Opinion would no longer be applicable. We



would appreciate notification of your final decision on this project.

Sincerely yours,

/s/ William F. Shake  
William F. Shake  
Assistant Regional Director  
Federal Assistance

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**UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)**

STATE OF CALIFORNIA - THE RESOURCES AGENCY  
GEORGE DEUKMEJIAN, Governor

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DEPARTMENT OF FISH AND GAME (Seal)  
Illegible NINTH STREET  
SACRAMENTO, CALIFORNIA 95814  
(916) 445-3531

May 10, 1985

Mr. Bill Fell  
Planning Services  
City of Monterey  
Monterey, California 93940

Dear Mr. Fell:

On April 19, 1985, members of my staff had the opportunity to review the Ponderosa Pine project with Mr. and Mrs. Bright. Since that time, we have reviewed the materials provided and have the following additional comments and recommendations.

We concur with the March 22, 1985 remarks of Mr. William Shake in his letter to the Veterans Administration that the subject project would be " . . . of little consequence to the butterfly species as a whole." However, as the discussion in Dr. Arnold's August 17, 1984 correspondence indicates it is not the species as a whole, but rather the population of an endangered species on the development site that is at issue. The data analyzed by Dr. Arnold and the U. S. Fish and Wildlife representatives indicates the project could be adverse to the future populations at the site in spite of the several mitigation efforts proposed in the revised plan.

We concur with Dr. Arnold's findings and recommend the following measures be incorporated in the habitat protection design to ensure the survival of the on-site population of the butterfly:

- 1) Add a provision to the Homeowners Association contract which states, "the Association will be responsible for maintaining and replacing the Smith's blue host plants (i.e. either of the two species of the buckwheat, *Eriogonum*) that occur in the habitat restoration zone of the project.
- 2) In line with the suggestions of the March 22, 1985 Fish and Wildlife Service letter, the remnant of existing butterfly habitat on the east corner of the property be included in a plan to manage it as part of the adjacent habitat belonging to the State Department of Parks and Recreation. Such action would not only protect the habitat in the State parcel, but enhance the value of the remnant of natural habitat that would remain on the Ponderosa site.
- 3) The Department be added to the review group for threatened and endangered plan preservation cited in Section 4 of the August 30, 1984 correspondence. This is in addition to being responsible for review of the habitat conditions.

We believe the measures outlined above would result in the protection of the endangered wildlife species on the project site and still permit the modified project to proceed subsequent to implementation of the above actions.

Thank you for the opportunity to discuss our concerns with you.

Sincerely,

/s/ Illegible  
for Jack C. Parnell  
Director

cc: Don Bright

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**UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)**

[LOGO] MONTEREY  
PLANNING & COMMUNITY  
DEVELOPMENT DEPARTMENT  
ZONING REPORT

**DATE OF REPORT:** August 9, 1985

**COMMISSION MEETING:** August 13, 1985

**APPLICATION NO.:** Tentative Map 84-09

**AGENDA ITEM:** J-1

**APPLICANT:** Davis, Jacoubowsky, Hawkins Associates

**PROPERTY OWNER:** Darrel Spence

**PROPERTY ADDRESS:** 2301 Del Monte Avenue

**PARCEL SIZE:** 37.6 acres

**EXISTING ZONING:** R-G-W-20

**GENERAL PLAN**

**DESIGNATION:** Residential - Low-Density (two to eight dwellings per acre)

**ENVIRONMENTAL**

**FINDING:** Exempt (Previous EIR certified)

**PROJECT**

**DESCRIPTION:** The proposed project is to develop 190 condominiums on 37.6 acres. The site acreage is assigned as follows:

1. Buildings and patios - 5.1 acres
  2. Public streets - 2.5 acres
  3. Private streets - 4.2 acres
  4. Landscaping - [7.9] acres
  5. Public Open Space [17.9] acres
- For a total 37.6 acres.

The condominiums are proposed to be developed as follows:

	Square Feet	Dwelling Units
1. "A" Units		
Three-bedroom	6,469	60
Two-bedroom	2,047	34
Subtotal		94
2. "B" Units		
Two-bedroom	2,978	66
3. "C" Units		
Two-bedroom	1,564	30
<b>TOTAL</b>	<b>236,760</b>	<b>190</b>
4. Dwelling Units per Acre 5.05 dwelling units		

The parking is proposed as follows:

1. Covered spaces - 284
2. Uncovered spaces - 242
3. Public spaces - 68
4. **TOTAL - 594 spaces**

This project has a long and complicated history. It began back in 1981 when Ponderosa Homes requested a 344-unit project approval. This request coincided with preparation of the City's Coastal Land Use Plan for Del Monte Dunes. That Land Use Plan has still not been certified by the Coastal Commission. The history of the project is as follows:

1. In 1981, Ponderosa Homes requested a Planned Unit Development and Tentative Map for 344 units.

2. On August 9, 1983, the Planning Commission denied the Tentative Map and Planned Unit Development request for 344 units.
3. On December 13, 1983, the Planning Commission denied a Tentative Map and Planned Unit Development for 264 units.
4. On July 24, 1984, the Planning Commission denied a Tentative Map and Planned Unit Development for 190 units.
5. On September 13, 1984, the City Council overruled the Planning Commission and approved a Site Plan, known as Scheme "D," for 190 units. The City Council conditioned that approval (see attached) by referring the amount of public parking, the view corridors, and maximum total floor area to the Planning Commission.
6. On April 9, 1985, the Planning Commission approved the amount of public parking, the view corridors, and maximum total floor area with conditions. Those conditions were:
  1. That an additional eighteen public parking spaces be provided as indicated on the revised plan.
  2. That there be sufficient signage on top of the bluff at the parking lot area and the highway regarding public parking.
  3. That the Architectural Review Committee be given the discretion to reduce the floor area by a maximum of 15% as indicated [sic] by the City Council and that it can be used for site amenities, either modulation of mass and scale, landscaping, or setbacks.
7. The Planning commission conditions were appealed by the applicant. On April 12, 1985, applicant withdrew appeal.

8. On June 18, 1985, City Council heard a request by the Architectural Review Committee for authorization to amend the approved site plan. City Council referred the request to the Tentative Map process. They concluded that these issues would be addressed when the Tentative Map is ready for Council consideration.
9. On August 13, 1985, Planning Commission will consider Tentative Map.

#### COMMISSION DECISIONS:

1. Under the City Subdivision Ordinance, the Planning Commission shall review the Tentative Map, this report, and by resolution, recommend to the City Council the approval, conditional approval, or disapproval of the Tentative Map. However, since most of the issues normally addressed in a Tentative Map have already been decided by previous City Council decisions, the Planning Commission's only action is to:
  1. find the Tentative Map in compliance with the September 13, 1984 City Council approved Site Plan (Scheme D).
  2. review and approve changes made by the Architectural Review Committee.
  3. find the Tentative Map in compliance with Council and Commission imposed Conditions of Approval.

#### STAFF CONCERNS: Staff concerns fall into five categories:

1. Does the Tentative Map comply with City of Monterey General Plan and City adopted Del Monte Dunes Land Use Plan?
2. Does the Tentative Map comply with the City Subdivision Ordinance and City policies and standards?



3. Does the Tentative Map comply with outside agencies' policies and standards?
4. Does the Tentative Map comply with City Council and Planning Commission conditions of approval on previous project decisions?

The attached August 7, 1985 memo from Coastal Planner Haywood Norton states that he has reviewed the proposed Tentative Map for the Del Monte Dunes project and found no inconsistencies with the Del Monte Beach Land Use Plan as adopted by the City. Since the Del Monte Beach Land Use Plan is used to determine General Plan consistency, it can be concluded that the proposed Tentative Map does comply with the General Plan.

The second staff concern deals with the Tentative Map's compliance with City Subdivision Ordinance including City policies and standards.

Procedurally, the proposed Tentative Map appears to comply with the City Subdivision Ordinance. Attached are memos from the Public Works Department and Fire Department on the project's compliance with City policies and standards. We received no other comments from City departments.

The third staff concern is the identified agencies policies and standards. Attached are letters from California-American Water Company and Monterey Disposal Service, Inc. The Cal-American Water letter directs the applicants to an acceptable water line connection. The Monterey Disposal letter raises concerns about trash collection from the subdivision. These concerns can be addressed through conditions of approval on the Tentative Map.

Staff's major concern is with the Tentative Map's compliance with City Council and Planning Commission conditions of approval on previous actions. The attached 13 September 1984 conditions of approval shall be reviewed condition by condition:

1. *SITE PLAN:*

Item a appears to be complied with. There are no proposed structures encroaching into the regional sewer easement. According to the Fire Department, the northwesterly lots have been redesigned and do not impact emergency access. On item b, Public Parking, the applicant has provided 18 additional spaces to his original 50 spaces for a total of 68 parking spaces. On item c, the Planning Commission should refer to the Architectural Review Committee report. The Architectural Review Committee has recommended approval of the Tentative Map. They did not reduce the total floor area. It thus remains for the Planning Commission to recommend the maximum total floor area (and without garages) of 236,760 square feet or something less. On item d, the Architectural Review Committee is recommending the Tentative Map solution on the view corridor alignment.

2. *PROCESS:*

Again, the Tentative Map has been reviewed by the Architectural Review Committee. Please see the Architectural Review Committee report (attached).

3. *SMITH'S BLUE BUTTERFLY:*

The developer has prepared a sand dune restoration program to preserve the habitat of the Smith's Blue Butterfly. Attached is a letter from the California Department of Fish and Game conditionally approving the habitat restoration program. We lack

approval of the program by the U. S. Fish and Wildlife Service. Apparently, they are concerned with a private homeowners association maintaining the habitat. On the other hand, they lack the funds to maintain the habitat. The City of Monteley [sic] must, therefore, decide whether to approve the habitat program without U.S. Fish and Wildlife Service approval.

4. *RARE AND ENDANGERED PLANTS:*

The Sand Dune Restoration Program addresses the rare and endangered plants condition.

5. *ACCESS:*

The Public Works and Fire Departments have reviewed the access (see attached memos). The proposed access appears satisfactory. The requirement that boardwalk design be approved by the Architectural Review Committee can be met when Architectural Review Committee grants final approval to the project.

6. *FENCING:*

Architectural Review Committee has not evaluated fencing on the site. This would be an appropriate review item when Architectural Review Committee considers final approval of the project.

7. *GRADING:*

The applicant has prepared a Grading Plan. That Grading Plan has been reviewed by the Public Works Department (see attached memo). Site grading appears to be satisfactory.

8. *UTILITIES:*

This condition required all utilities be underground. This condition will be monitored through the progress of the project.

9. *FIRE DEPARTMENT REQUIREMENTS:*

See the attached Fire Department memo for compliance with this condition.

10. *PUBLIC WORKS DEPARTMENT [sic] REQUIREMENTS:*

See the attached Public Works Department memo for compliance with this condition.

11. *HOME OWNERS' ASSOCIATION:*

The Home Owners' Association agreement is attached. It has been reviewed and approved by the City Attorney as meeting the requirements of this condition.

12. *SOUNDPROOFING BETWEEN UNITS:*

This condition requires each unit be appropriately soundproofed. This condition will be monitored as [sic] the plan check and building inspection stage.

13. *PARK DEDICATION FEE:*

This condition required that an Open Space easement to the City be dedicated for the areas seaward of the development line and on the back dune. There is no statement on the Tentative Map dedicating those areas. It could thus be a condition of the Tentative Map that those areas be dedicated. Since these are the habitat areas, it may be more appropriate to put these areas into the common open space category for the Homeowners' Association to operate and maintain.

14. *AFFORDABILITY AGREEMENT:*

This requires the applicant to comply with the City's moderate-income housing requirements. The applicant has submitted a letter saying that he wishes to provide housing on-site to meet that requirement.



15% of the 190 units, or twenty-nine units will be required to be moderate-income housing. The developer proposes to construct, [sic] "an appropriate percentage . . ." of affordable units with each phase. It should be a condition of Tentative Map approval whether this is acceptable to the City.

15. **EXPIRATION:**

This is the Use Permit's expiration.

It appears that the Conditions of Approval have been addressed and substantially met by the applicant's Tentative Map. While the Smith's Blue Butterfly Habitat Preservation Program has not been approved by the U.S. Fish and Wildlife Service, it may be appropriate for the City of Monterey to take a position approving the wildlife habitat program and assigning the responsibility for maintaining the habitat to the Del Monte Dunes project Homeowners' Association. If, at some later point in the review process (for example, during the Coastal Permit phase), the California Department of Fish and Game or U.S. and Wildlife Service wish to add additional requirements, they could.

**STAFF RECOMMENDATIONS AND FINDINGS:** Staff recommends that the Tentative Map be approved, finding that:

1. The design or improvement of the proposed subdivision is consistent with the objectives, policies, general land uses, and programs of the City's adopted General Plan and Del Monte Land Use Plan.
2. The site is physically suitable for the type and density of the proposed development.
3. The design or improvements of the proposed subdivision are not likely to cause substantial environmental

damage or substantially and avoidably injure fish or wildlife or their habitat.

4. The design of the subdivision or the type of improvements is not likely to cause serious public health problems.
5. The design of the subdivision or the type of improvements will not conflict with easements acquired by the public at large for access through or use of property within the proposed subdivision.

**SUGGESTED CONDITIONS OF APPROVAL:**

The current Planned Unit Development Conditions of Approval should be maintained. Additional conditions are:

1. The developer shall continue to attempt to secure approval of the Dune Restoration Program by the U.S. Fish and Wildlife service. Any significant changes to the Tentative Map as a result of that review will require an approval by the City of Monterey and may require resubmittal of the Tentative Map.
  2. The sand dune area seaward of the development and the back dune area between the development and Del Monte Avenue shall be placed in common ownership for sand dune Smith's Blue Butterfly habitat operation and maintenance.
  3. The Architectural Review Committee shall pay particular attention to the height and design of retaining walls proposed in the project, particularly on the access road along the ease [sic] boundary.
  4. Affordable housing units may be constructed with each phase provided that the appropriate percentage provided for each phase is at least 15%.
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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)

CITY OF MONTEREY

To: Community Development Director  
From: Senior Planner (Norton)  
Date: August 13, 1985  
Subject: Status of Approvals of Proposed Restoration  
Plan of the Del Monte Dunes Project

Recently there has been some question as to whether or not the July 25, 1985 letter from the State Department of Fish and Game represents approval of the proposed restoration plan for the Del Monte Dunes project. This afternoon, I talked to Bruce Elliott of State Fish and Game staff and he stated that the July 25th letter does represent approval subject to the conditions listed in the letter and State Fish and Game's May 10, 1985 letter. Mr. Elliott strongly emphasized condition 2 in the July 25th letter which recommends that the area designated to be restored butterfly habitat would subsequent to restoration be dedicated to a State agency such as the State Parks and Recreation Department.

I also talked to William Shake, Deputy Regional Director of the U. S. Fish and Wildlife Service in Portland, Oregon. Mr. Shake explained that Fish and Wildlife's comments would be limited to the March 22, 1985 letter stating the biological opinion that the Del Monte Dunes project as proposed would not jeopardize the continued existence of the Smith's Blue Butterfly. Mr. Shake also explained that although the biological opinion contained recommendations as to how the proposed restoration plan

could best be implemented, these recommendations were only recommendations which could, at the discretion of other agencies, be used as conditions of approval. The State Department of Fish and Game is recommending that these conditions be a part of any approval of the proposed restoration plan.

/s/ Haywood Norton  
Haywood Norton

HN:ras

attachments

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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)

CITY OF MONTEREY  
PLANNING COMMISSION MINUTES  
JANUARY 28, 1986

Motion: On motion by Hollingsworth, seconded by  
Cunningham, this matter is continued to March  
25, 1986, by the following vote:

AYES: 6

COMMISSIONERS:

Cunningham, Hambaro, Hollingsworth, Kracht,  
Menmuir, Villa

NOES: 0

ABSENT: 3

COMMISSIONERS:

Edgren, Ragan, Unappointed

2. Application: DEL MONTE DUNES (PONDEROSA  
HOMES), Tentative Map 84-09; Review  
Final EIR; 2301 Del Monte Avenue,  
C-3, R-G-W-20

Consider Tentative Map.

Appearances: Paul Davis, project architect; Don  
Bright, consultant; Mary Anne Mat-  
thews, California Native Plant Society;  
Joyce Stevens, Jenny Feigens, Ventana  
Chapter, Sierra Club; Rick Heuer;  
Mary Bell Hughes; Ed Leeper; Richard  
Lind, Del Monte Beach Neighborhood  
Association;

Staff

Discussion: Mr. Fell advised the Commission that  
it has now been supplied with the var-  
ious items requested at the December

10, 1985, meeting, including the Final  
EIR, elevations, sections, the final res-  
toration plan, and all suggested Condi-  
tions of Approval. He discussed the  
various Conditions and amendments  
to them. He made reference to a letter  
from Rick Heuer. Mr. Fell stated the  
one question which has not yet been  
answered is whether the final restora-  
tion plan has been approved by the  
Departments of Fish and Game and  
Fish and Wildlife, and he asked that  
the applicant address that concern.

Applicant: Mr. Davis made a slide presentation of  
the view corridor aspect of the project.  
He stated building up the dune will  
substantially improve screening and  
mitigate concerns expressed in Mr.  
Heuer's letter. To query about afford-  
able housing units, he responded they  
are all located in Unit C.

Consultant: Dr. Bright gave a brief overview of the  
preservation and restoration plans. He  
said both the Department of Fish and  
Game and Fish and Wildlife declined  
to review the changes to the restora-  
tion plan because they had previously  
reviewed it. They do not have the  
resources to do so. The main goal of  
the restoration plan is to provide the  
potential for maximizing the preserva-  
tion of the Smith's Blue Butterfly. He  
explained the City will not allow  
access through Tide Avenue, and the  
State will not allow access through the  
State park. To questions concerning

when approvals of the restoration plan could be expected, Dr. Bright stated prior to the issuance of City permits. He said the Coastal Commission's approval must also be obtained.

Commission  
Discussion:

Ms. Hollingsworth stated one of the critical view points is from the beach looking up. The Commission discussed Mr. Shake's letter being contradictory to the statements made by Dr. Bright, especially concerning access. Mr. Villa stated the access being proposed appears to be the one which would cause the most harm to the Smith's Blue Butterfly. Ms. Kracht expressed concern that with construction, the habitat will be removed. The ice plant is to be removed. The Buckwheat will not have matured, and she asked what is to happen to the Smith's Blue Butterfly during the move. There was discussion concerning maintenance of the restoration plan. Concern was expressed regarding the east portion of the preservation. It was suggested the habitat area be increased. The Commission said it wants the fencing up prior to any restoration activities.

Consultant:

Dr. Bright stated two species serve as the food source, and during the move the other available source could be utilized. Responding to questions about what would stabilize the sand dunes when the ice plant is removed, Dr. Bright said the ice plant roots would

remain, which would provide the necessary stabilization. Dr. Bright said maintenance will be the responsibility of the developer, and the State Parks and Recreation Department is being considered as manager of the plan.

Public  
Discussion:

Ms. Matthews said her organization has given highest priority to the preservation and restoration of the Monterey dunes. She expressed disappointment that Dr. Arnold's recommended changes to the site plan have not been made. Contrary to Dr. Bright's statements, she said there are populations of Buckwheat within range of the Smith's Blue Butterfly. If this project is approved, gene interchange will be cut off. She quoted from letters from the Department of Fish and Wildlife and pointed out the inconsistencies with Dr. Bright's statements. The main point is that both Dr. Arnold and the Department of Fish and Wildlife state most of the habitat will be destroyed by this plan. Ms. Stevens said 190 units translates into approximately 500 persons on this site and impacting the beach. She said City Resolution 84-51 allows between 150 and 190 units to be built, and she would like to see the number reduced. She recommends that the back row of units (approximately 20) and some other buildings be removed from the project because that is the location of the Buckwheat. Ms. Feigens stated this



project would impact our coastal view, traffic flow and the recreational trail. Access to the project is a problem. The size of the project will destroy the habitat, and she asked that the number of units be reduced. Mr. Heuer discussed the sightline from the Holiday Inn. He is concerned that there is insufficient information to determine whether or not the site will be visible from the Holiday Inn. Mary Bell Hughes expressed concern about inadequate access to the public and State beaches. She stated only one access point will create a hardship to the beach. Mr. Leeper said the project is too large, and he questions whether 190 units is consistent with the City's General Plan. He addressed the importance of the General Plan and read from various sections of it. He also cited the California Coastal Act regarding development. Mr. Lind questioned how the updated EIR addresses the traffic situation. He expressed concern over the entrance's safety and damage that will be caused to the dunes. He urged the Commission to send the project back to the City Council

Consultant: Dr. Bright refuted statements made by various public speakers. He said all of the Smith's Blue Butterfly habitat will not be destroyed; a portion is being preserved. It is untrue that there is little chance of survival for the Smith's

Blue Butterfly. Much of the site is covered by ice plant which grows continuously. The dune species will not prevail unless some changes are made to the present site. His restoration plan is workable.

Applicant: Mr. Davis commented that the buildings Ms. Stevens proposes to eliminate total 56 units, not 20 units. This is not a natural dune area in its natural form. It is a disturbed area. Density is not at maximum. Originally, the R-G standards would allow 900 to 1,000 units on this site. He gave a history of the project and its review process. He stated the issues being discussed this evening are far beyond that directed by the City Council. He asked that action be taken on this project.

Staff

Discussion: Mr. Wojtkowski stated the Use Permit was initially approved by the City Council in August. It was returned to the City Council for approval of conditions in September. The Use Permit expired March 13, 1986. Staff concurs with applicant that a decision be made on this project. The decision is whether the Planning Commission agrees that all the issues have been met subject to conditions. If the Commission does not agree the conditions have been met, the project should be denied.

Commission

Discussion: Ms. Kracht said since this project was sent to the Commission, there have

been the east Del Monte Avenue study, the recreation trail project and the State Parks and Recreation plan, all of which impact this property. she wonders if the City Council would have set up the same kind of conditions in view of these developments. She said access is not the only issue and that land use must also be considered.

Staff

Discussion: Mr. Wojtkowski responded by stating the only viable access is from the south, and he does not believe any of the three plans mentioned by Ms. Kracht are applicable to this project. The only question recently has been one of density. The land use designation is residential. He said he believes the conditions have been met [sic] regarding the restoration plan proposed by Dr. Bright.

Motion: On motion by Cunningham, seconded by Hollingsworth, the Tentative Map is denied by the following vote:

AYES: 6

COMMISSIONERS:

Cunningham, Hambaro, Hollingsworth, Kracht, Menmuir, Villa

NOES: 0

ABSENT: 3

COMMISSIONERS:

Edgren, Ragan, Unappointed

Commission  
Discussion:

Mr. Cunningham stated the view corridors, the view from Highway 1, and the dune restoration plan are not what the City Council desired. Ms. Kracht feels the bulk and mass need reduction. She referred to the 15% floor area ratio reduction, and Mr. Wojtkowski advised there has been a 15% reduction in density, and the Architectural Review Committee concurred with applicant that further reduction to the proposed floor area was unnecessary. Ms. Hambaro suggested the existing habitat be looked at and preserved as recommended by the Native Plant Society by removing the back row of units. She is concerned with extinction of the species, and wants as much habitat preserved as possible. Ms. Menmuir questions the visibility and angle of the buildings caused by the revised grading plan. She expressed concern with the ambiguity of opinions presented. Mr. Villa agreed with Ms. Menmuir, stating a lot of the scientific information is contradictory. Ms. Hollingsworth expressed concern with the view corridors, especially from the beach. She feels the restoration plan is inadequate and inconsistent. She said at the time the City Council approved this project, they were concerned with the view corridors within and without the project. The Council was also concerned that all affordable housing not be in one area.



There being no further business, the meeting adjourned at 11:45 P.M.

APPROVED:

\_\_\_\_\_  
Dan Villa, Acting Chair

ATTEST:

\_\_\_\_\_  
Bill Wojtkowski,  
Secretary

\_\_\_\_\_

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.E.)

FINAL

RESTORATION PLAN FOR THE  
PHILLIPS PETROLEUM SITE  
DEL MONTE BEACH, MONTEREY, CALIFORNIA

Prepared by:

Bright & Associates  
1200 N. Jefferson, Suite B  
Anaheim, California 92807

February, 1986

DEL MONTE DUNES  
RESTORATION PLAN

February, 1986

I. INTRODUCTION

This plan is based on the results of numerous public hearings before the City of Monterey City Council and Planning Commission, specifically City of Monterey requirements for the project and, to the extent feasible, suggestions of the Fish and Wildlife Service and California Department of Fish and Game.

A residential development is proposed on property located in the Del Monte Beach area of Monterey, California (see Figure 1). The site is bounded on the north by the ocean, on the east by the state property administered by the State Department of Parks and Recreation, on the south by private property and the Southern Pacific Railroad spur parallel to Del Monte Avenue and on the west

by the Del Monte Dunes neighborhood, including the Harbor House apartments.

The site, 37.6 acres in total, contains a disturbed Coastal Strand habitat, i.e., a mixture of native and disturbed sand dune and non-native species. The disturbed nature of the site is due to past petroleum activities, construction of Highway 1, planting of ice plant as ground cover, use of the site by off-road vehicles, unauthorized dumping of various kinds of debris, etc. The greatest impact on the dune habitat historically was the introduction of the two species of ice plant to stabilize the dunes while petroleum activities were being conducted. These two species now occupy about 25% of the entire site. Most recently, the greatest impact has been from off-road vehicles.

## II. GOALS OF THE RESTORATION PLAN

The most important goal of this Dune Restoration Plan is to achieve effective restoration, enhancement and maintenance of about 17 acres of the Phillips Petroleum site, e.g., preservation of native dune areas to the extent feasible, phased removal of the ice plant, and addition of a variety of native dune species in appropriate portions of the site.

The general goals of the plan are as follows:

- A. Reduce the potential for uncontrolled sand erosion on certain portions of the Phillips site.
- B. Preserve native dune habitat areas to the extent feasible.

- C. Enhance portions of the site to achieve native-like conditions, e.g., removal of ice plant and existing man-made structures.
- D. Restore dune areas impacted by development of the proposed project.
- E. Preserve certain existing and provide potential additional habitat areas for the Smith's Blue Butterfly, *Euphilotes enoptes smithi*.
- F. Develop short-term and long-term maintenance plans to assure that the restoration activities maintain reasonable vitality.
- G. Provide a restoration program which achieves the goals of the City of Monterey and the Del Monte Beach Local Coastal Plan.
- H. Provide a Restoration Plan that complies with setbacks, density limitations, public parking, public access, viewshed and project access requirements established by the City of Monterey City Council and Planning Commission.

## III. EXISTING SITE CONDITIONS

The project site presently is vacant, but it has been historically altered by three major events: petroleum activities, construction of Highway 1, and, most recently, by construction of the wastewater interceptor line which traverses the site. The dune area over the interceptor line has been altered by the addition of "new" 15' high dunes, jute matting, snow fencing, irrigation, hydromulching and revegetation activities. In addition to these three



major events, there has been extensive damage to the dunes habitat associated with uncontrolled off-road vehicle activities.

Vegetation on the 37.6 acre project site consists mostly of prostrate and succulent groundcover which acts to stabilize the dynamic sand dune environment. Most of the site, about 25%, is covered with sea-fig, *Mesembryanthemum chilense*, and hottentotfig, *Mesembryanthemum edule*. Both of these species of "ice plant" are african plants, i.e., non-native, and they are very hardy, competitive plants. They have, because of a high percent cover of the sand, stabilized most of the project site. They also have displaced some of the less competitive native dune species. There appears to be a continual flux in the abundance of this plant on the site, i.e., it dies back in some areas, and increases in other areas. However, in general, this plant very slowly is occupying a greater percentage of the Phillips site. We estimate that the increase per year, on the average, is about 0.005%.

The native vegetation includes coast live oak (*Quercus agrifolia*), buckwheat (*Eriogonum latifolium*), silver beach weed (*Ambrosia chamissonis*), several species of lupines (*Lupinus* sp.), dune grass (*Poa douglasii*), deerweed (*Lotus scoparis*), and heather goldenbush (*Haplopappus ericoides*). A row of mature, non-native eucalyptus trees are located near the back dune area in the southwestern portion of the site. The coast live oaks primarily are located along the back, protected portion of the dune and they aid in stabilizing that portion of the dune. See Table 1 for a more complete list of plant species identified on the Phillips Petroleum site.

The buckwheat plant, *Eriogonum latifolium*, occurs in patches on several portions of the project site. It is estimated, from field reconnaissance and interpretation of recent aerial photographs, that it now occurs on about 0.5% of the site (1.88 acres). There have been changes in recent years in the number of individual plants of this species on the site. Arnold estimated that there were 65 plants in 1982 and Turner estimated that there were about 250 plants in 1983. Our count of *Eriogonum latifolium* in 1984 indicated over 1,000 plants and about 950 plants in 1985. Although the numbers indicate that there has been a significant increase in plants over the last four years, we believe that this is partially due to the fact that other people were not aware of the property boundaries and, thus, did not count all plants. An increase in the number of plants may indicate two things: first, there may be recruitment, i.e., addition of new plants, and second, certain of the plants may be maturing. The plants presently on the site demonstrate varying [sic] degrees of maturity and survival. Based on random checking of plants during field reconnaissance in June and July, 1984, about 38-40% of the plants are mature; mature indicating a plant of about 0.4 to 0.65 meter (about 16-26") in height, with at least 8 petioles of 3-4 decimeters (about 12-16") in height, and with the inflorescence (flowerhead) about 20-30 millimeters (around 1") in width. In 1985, about 20% of the plants were mature, except for the area located in the extreme northeast portion of the property in which about 80% of the plants were considered mature.

In spite of the increase in the number of plants, the general distribution (occurrence over the site) of

*Eriogonum latifolium* has not increased since 1981, i.e., it is found on only 0.5% of the site.

There is another buckwheat, *Eriogonum parvifolium*, characteristically found in the adjacent sand dunes to the northeast. However, during our field reconnaissance since 1981, we did not find this species on the Phillips Petroleum site. Arnold (1982) found some individual plants of this species along the embankment next to the railroad tracks, Del Monte Boulevard, and California Highway 1. However, these plants were on the property adjacent to the Phillips site.

There are several species of animals commonly found on the Phillips site, namely: western fence lizard (*Sceloporus occidentalis*), alligator lizard (*Gerrhonotus multicarinatus*), tree swallow (*Iridoprocne canadensis*), white crowned sparrow (*Zonotrichia leucophrys*), purple finch (*Carpodacus prupureus*), and a variety of insects, e.g., ants, beetles, flies, etc.

Extensive studies have been completed on the occurrence of the Smith's Blue Butterfly (*Euphilotes enoptes smithi*). Arnold (1983) conducted extensive research on the ecology of this butterfly, particularly at two sites on the Fort Ord Army Reservation located about 2.0 miles east of the Phillips site. Arnold noted that this species is widely distributed as scattered, isolated populations occurring from the Rocky Mountains to the West Coast. Populations are associated with their larval foodplant *Eriogonum*, typically in habitats with sand dunes or rocky hillsides, at elevations ranging from sea level to 3,350 meters. Populations of the Smith's Blue Butterfly confined to coastal Monterey County, occur in various dune

and canyon habitats. There are six dune habitats in the coastal Monterey area, i.e., mouth of the Salinas River, Marina Beach dunes, Fort Ord, Seaside Dunes, Monterey Dunes (Phillips site), and Point Lobos State Reserve. Arnold considers the Seaside Dunes as almost extirpated, and the Monterey Dunes as largely decimated.

No eggs, larvae or adult Smith's Blue Butterflies were found on the Phillips site during our late-June to mid-July field reconnaissance during 1981, 1982, and 1983; further, none were found through July 12, 1984. Arnold (1982) found eight eggs and 42 larvae after examining 130 flowerheads of *Eriogonum parvifolium* located along the railroad track near Highway 1 (Note, that above it is stated that this species of buckwheat was found on the property adjacent to the Phillips petroleum site). Thus, prior to July, 1984, we found no evidence of any life stage of the Smith's Blue Butterfly on the Phillips site. However, on July 12, 1984 we found three larvae; only one of which was identified as SBB. That larva was found on the extreme eastern portion of the property. The occurrence of this larva in 1984, as contrasted with the years 1981 through 1983, most likely is associated with the increased maturity of the *Eriogonum latifolium* plants on the extreme eastern portion of the Phillips site.

During June 1985, about 10% of the plants were examined for butterfly larvae and the general area was examined for butterflies. Approximately 745 blossoms were examined and no larvae were found in any of the blossoms. The area in the northeast corner of the property contains the most native dune-like habitat area, the largest number of *Eriogonum* and the largest number of mature *Eriogonum*. Two additional field reconnaissance



[sic] trips were conducted in the summer of 1985 but no evidence of SBB larvae or adults was found.

Arnold (1983) estimates that the Monterey Dunes (Phillips site) habitat comprises about 1% of the Smith's Blue Butterfly total habitat in the Monterey coastal area. Further, Arnold notes that the successful existence of this species is based on having adequate available, usable space. Recent research has indicated that as the breeding area for butterflies decreases, there is an adverse impact on the survival rate and lifespan of the butterflies. This implies that for patchy habitats, i.e., habitats that are discontinuous geographically and variable in size from small to smaller, species will reach a level where the survival rate will be very low and where the possibility of extinction is very high. This habitat influence is particularly significant for the Smith's Blue Butterfly since the potential for colonization is very low to nonexistent. Unless the habitat on the Phillips site is deliberately increased in size and unless even that increased habitat achieves a greater level of viability, the possibility of the Smith's Blue Butterfly actively and successfully using the Phillips site is deemed to be very low. Since the butterfly has not used the site in recent years prior to 1984, it indicates that the habitat has not been suitable. Further, the limited distribution of the food plant on the site (0.5%), even if the majority of the plants were mature, precludes the site ever supporting a large population of butterflies unless the majority of the site is restored.

#### IV. ACCESS TO THE PHILLIPS SITE

The issue of access has been discussed with various public agencies during the extensive review of the proposed project. Three options were reviewed to access the Phillips site: via Tide Avenue on the western margin of the site, through the state property on the eastern margin of the site, and via Del Monte Avenue on the southern margin of the site. Based on a number of concerns, including analyses of the existing habitat and requirements of a successful restoration plan, access via Del Monte Avenue, with emergency access via Tide Avenue, has been selected by the City of Monterey as the best option. Access via Del Monte Avenue will require the removal of an existing paved road, which varies in width from 16-18', removal of existing buildings and paved parking areas, and loss of about two coast live oak trees. This access will not alter the dynamics of the dune processes since it will be located on the furthestmost inland portion of the dune. Further, this access will allow development of some semi-isolated areas, i.e., away from human activity, where restoration can be carried out to provide potential new habitat for the Smith's Blue Butterfly.

#### V. PROJECT RELATED HABITAT IMPACTS

Residential development is proposed on approximately 19.5 acres of the Phillips site (see Figure 1). This acreage will be used as follows: 4.5 acres for buildings, 4.5 acres for paved streets, and 10.5 acres for landscaping. In addition, there will be about 0.7 acre of paved area for the access road leading from Del Monte Avenue. About

65% of the access road already is paved, and the resultant impacts will be less than if the road were constructed on an undisturbed dune area. The total developed area will occupy about 20.2 acres, leaving about 17.4 acres undeveloped.

The present habitat of the area to be developed, exclusive of the access road, based on field reconnaissance and interpretation of aerial photographs, is as follows: tank pad sites = 0.70 acres; ice plant coverage = 7.70 acres; areas with hardened oil fragments, remnants of pipelines, etc. = 3.30 acres, and dune habitat (both undisturbed and disturbed) = 7.80 acres. We estimate that 65% of this dune habitat is disturbed.

The proposed development will require removal of the tank pad sites, the ice plant, hardened oil fragments, remnants of pipelines and the 7.80 acres of undisturbed and disturbed dune habitat. Accordingly, there will be a loss of some *Eriogonum latifolium* and other dune plants. Construction of the proposed access road will not result in the loss of any *Eriogonum latifolium*, but it will result in the loss of about two coast live oak trees and in the removal of considerable ice plant.

#### VI. RESTORATION PLAN POLICIES AND CONCEPTS

A Restoration Plan is proposed which will preserve, restore and augment existing conditions. The basic components of the plan will:

- Reduce the potential for uncontrolled sand erosion on certain portions of the Development site;

- Allow portions of the dune to remain in their existing state, including areas heavily vegetated with *E. latifolium*.
- Enhance the degraded portions of the site to achieve native-like conditions;
- Replace or restore dune areas lost or damaged by development of the project;
- Provide potential habitat areas for the Smith's Blue Butterfly, *Euphilotes enoptes smithi*;
- Provide a "corridor" for potential butterfly migration along the backside of the dune area by leaving an opening in the "living fence";
- Eliminate the use of snow fencing or jute matting, in order to allow some natural migration of sand; the only exception to this may be in the area along the eastern side of the project site where a dune is required to screen the development from Highway 1;
- Develop short-term and long-term maintenance plans to assure that the restoration activities maintain reasonable vitality;
- Eliminate exotic plants, e.g., ice plant, which tend to out-compete and destroy native vegetation.
- Coordinate restoration efforts with the ongoing, on-site restoration plan, established after construction of the wastewater interceptor line, which traverses the project site;
- Eliminate resculpturing of dunes except to provide the City required visual screen on the eastern boundary of the property.



- Provide protection of the native habitat and the development from uncontrolled wind erosion;
- Provide a restoration program which achieves the requirements of the City of Monterey City Council and Planning Commission and the proposed Del Monte Beach Local Coastal Plan;
- Eliminate use of off-road vehicles on the dune area;
- Provide public use of the beach area, while protecting certain dune habitat areas from trampling; and
- Encourage the State Department of Parks and Recreation to continue restoration activities on their property adjacent to the Development site, especially that portion adjacent to the restoration areas.

To the extent feasible, dunes will remain in their natural condition, i.e., Preservation areas (see Figure 2, Area B). Other areas will have appropriate native plants added to them to help stabilize the dune and prevent sand blowout areas (see Figure 2, Area A). Only one area will be graded to provide an "artificial" dune and this is for visual screening, as required by the City of Monterey (see Figure 2, Area C).

#### A. Preservation Areas

To the extent feasible, dunes will remain in their natural condition and configuration. Primarily, these areas will be parallel to the ocean front, include the northeastern corner of the site and the back dune area,

i.e., north of the access road (see Figure 2, Areas A and B).

Certain areas shall be considered preservation areas, i.e., areas which are not impacted by development and where public access will be restricted. Plants and animals in these areas will have the opportunity to develop without direct human influences (see Figure 2, Area B).

A large area that contains *E. latifolium* in the northeast portion of the site will remain in its existing condition, i.e., all the existing plants will remain except for any ice plant which will be removed (see Figure 3). Ice plant and all manmade structures along the back dune area will be removed, a small amount of sand will be added if necessary, and native dune plants (Type A, see definition below) will be added where necessary. No major grading or artificially recontoured dunes will occur in Preservation Areas (see Figure 2, Area B). The concerns and related policies are as follows:

#### 1. Pre-Construction Activities:

Certain portions of the site will be preserved or only require minor enhancement (Figure 2, Areas A and B). Prior to construction, where no development or only minor enhancement will occur, such areas shall be temporarily fenced to prevent accidental trampling, accidental damage by vehicles/heavy equipment, etc. All construction workers will be informed about these areas and why they are fenced. The fences will remain in place until construction activities are completed.

## 2. Post-Construction Activities:

Following construction activities, preservation areas shall be permanently secured from trampling. A "living fence", i.e., line of coast live oaks, will be placed along portions of the access road. This will be located so that emissions from cars and visitors to the area will not significantly impact the back dune portion of the site. However, the "living fence" will stop before the road curves to go upon the hill. This will assure that the SBB has a potential corridor for migration from areas west of the proposed development. Elevated and marked public boardwalks will be provided from the main public access point (parking area) to the beach to limit trampling of native dune species.

### B. Restoration Areas

Certain areas will be altered by construction activities (see Figure 2, Area C and portions of Area A). Portions of Area A may be impacted by the deposition of sand from onsite grading activities and development of the public parking facilities. A berm is required along the eastern property boundary (see Figure 2, Area C) to provide a visual screen from traffic along Highway 1.

#### 1. Pre-Construction Activities:

In areas where development is proposed, a landscape architect, biologist or other person knowledgeable about native dune species, shall, immediately prior to grading, be responsible for removing and preserving as many native dune seedling plants and seeds as possible. The seedlings will be planted in areas not proposed for development and where no dune restoration is

required or kept either on or off the site where they will be protected from construction activities, visitors to the beach, etc. All such seedling plants must be handled carefully to help assure their continued vitality. It is anticipated that for certain of the species the mortality rate could be high, about 50-60%.

Seedlings and seeds will be obtained from all native dune plants which exist on the Phillips Petroleum site including *Erogonum*, *Haplopappus*, *Ambrosia*, *Abronia*, *Lupinus*, *Lotus*, etc. Also, certain native plants which are no longer common in the area may be reintroduced to the restored dunes, if seeds and/or seedlings can be located, e.g., *Castillaja latifolia*, Monterey paintbrush, *Dudleya caespitosa*, Live-forever, etc. Any coast live oaks removed for the construction of the access road will be relocated immediately to the site for the "living fence."

## 2. Post-Construction Activities

The short-term objective is to restore and stabilize the dune areas altered by construction and other human activities. The long-term objective is to provide additional restored areas which contain native dune habitat and protect the restored areas by precluding unnecessary public access and enforcing an effective maintenance program.

As soon as possible, dune restoration shall be commenced in areas impacted by development. It is very important that revegetation of the dunes begin immediately thereafter to minimize the potential for excessive erosion. The time sequence preferred is as follows: grade the site in the late spring and summer after the strong spring winds; and begin revegetation or



augmentation planting in early fall (October) so that the newly planted seedlings can take advantage of the rainy season.

No irrigation system is proposed as part of this restoration plan as plants could become water-dependent, rather than low water tolerant as is usually the case in dune environments. It is expected that this type of a restoration policy may result in an initially high plant mortality rate; however, the plants that survive will be hardy and better able to cope with the harsh dune environment. Therefore, an aggressive maintenance program is proposed.

No jute matting or snow fencing is proposed as part of this restoration plan in order to simulate a more native type of sand dune environment. The only exception to this may be the use of jute matting in Area C (Figure 2) to assure that the height of this berm is maintained to provide a visual buffer as required by the City of Monterey. This area will be planted with Type A plants (see definition of Type A plants below).

The types of plants used for the restoration plan will vary depending on their location. In the areas most susceptible to wind erosion, i.e., the foredune area, stable, hardy, low-lying dune plants will be used, e.g., *Ambrosia*, *Abronia*, etc. (Type B vegetation). More bushy, woody shrubs, e.g., *Eriogonum*, *Lupinus*, *Haplopappus*, etc., will be placed on the more protected portion of the dunes (Type A vegetation). These plants will provide a reasonably extensive root system and will be important in stabilization of the dune areas.

### C. Plant Types

The species of plants currently identified on the site are listed in Table 1. For purposes of the restoration plan, we have evolved two assemblages of plants, i.e., Type A and Type B. Type A plants will be used in the hinddune and more protected locations and Type B plants will be used on the foredune and the topdune areas.

In areas most susceptible to wind erosion, i.e., the foredune area, Type B vegetation will be planted. No jute matting or snow fencing will be used to stabilize [sic] sand movement. Rather, the more natural dune conditions of minor sand migration will be allowed to continue. The one exception to this may be the berm on the northern boundary of the property which will be constructed to provide a visual barrier to the development from traffic on Highway 1. The height of this dune must be maintained for visual purposes.

Stable, hardy, low-lying dune plants will be placed on the bluff of the dunes, which are subject to the most severe environmental conditions. More bushy, woody shrubs will be placed on the more protected portion of the dunes.

#### Type A Plants:

<i>Baccharis pilularis</i>	Coyote Bush
<i>Eriogonum latifolium</i>	Buckwheat
<i>Eriogonum parvifolium</i>	Buckwheat
<i>Haplopappus ericoides</i>	Heather
	Goldenbush
<i>Lotus Scoparis</i>	Deerweed
<i>Lupinus arboreus</i>	Bush Lupine

Type B Plants:

## Foredune Areas:

<i>Abronia latifolia</i>	Sand Verbena
<i>Ambrosia chamissonis</i>	Sand Verbena
<i>Artemisia dracunculus</i>	Tarragon

## Topdune Areas:

<i>Abronia latifolia</i>	Sand Verbena
<i>Abronia umbellata</i>	Sand Verbena

Please note that this list is for planning purposes and the final list of plant species will be based on discussions with the California Native Plant Society and may include native dune species identified in Table 1 herein.

D. Plant Handling

A plan for sequential removal and some immediate replanting of Type A and Type B plants will be developed with the general contractor. Also, viable seeds will be collected. Such a plan will require careful handling of all seedling plants and seeds.

The seedling plants removed from the site will be immediately planted. New seedling plants will be generated from the seeds collected on the site or from immediately adjacent sites.

In certain areas hydromulching could be used. Seeds to be sowed could include, among others, those from *Abronia latifolia*, *Eriogonum latifolium* and *parvifolium*, and *Haplopappus ericoides*.

On a priority basis, the area to be replanted with Type A plants located between the "living fence" and the

access road/eucalyptus trees, should be developed as soon as possible. Preferably, this area should be prepared for revegetation prior to any development activities. That way, plants in the project area can be relocated, seeds collected, etc., before site improvements begin. It is believed that this area will be the most suited for use by the Smith's Blue Butterfly (see Figure 2, Area B).

E. Public Access Trails

Three major public access trails will lead from the public parking areas to the beach. Elevated boardwalks will be provided and clearly marked to limit unnecessary foot traffic across restoration areas. A well designed access pathway will be required at the area opposite Tide Avenue to preclude indiscriminate entry to the restored dune areas.

The following policies will be implemented:

- Public access to the dune areas and the adjacent beach will be focused by locating the public parking at the end of the entrance road to the project area.
- Public access trails will consist of elevated boardwalks and be clearly marked.
- Occupants of the proposed project will be informed of the presence of public parking and related access trails and advised to call enforcement agencies if they see individuals damaging the public facilities or the adjacent restored dune areas.



### F. Prohibition of Off-Road Vehicles

An extremely important aspect of the restoration plan will be to prevent off-road vehicles from driving on any portion of the dune areas. Such abuse of the dunes will delay/inhibit restoration and preservation activities, disturb the Smith's Blue Butterfly, etc. Therefore, the following policies will be implemented:

- Fencing shall be provided to prevent entry into the dune areas, e.g., where internal roads dead-end; however, such fences shall not prohibit public access to the adjacent beach area.
- Areas established for public access to the dune areas and the beach shall be fenced to prevent vehicular entry.
- Appropriate signs shall be placed at public access points indicating that the use of off-road vehicles on any portion of the dune area and adjacent beach is prohibited.
- A vehicle barricade shall be placed opposite the extension of Tide Avenue; this barricade must be strong enough to withstand easy removal by a winch on an off-road vehicle but also constructed so as to provide an emergency access acceptable to the City of Monterey Fire and Police Departments.
- Occupants of the proposed project will be informed of the dune restoration program and advised to call enforcement agencies if they see off-road vehicles in the dune areas.

### VII. MAINTENANCE PROGRAM

The restoration plan must include a short- and a long-term maintenance program. The short-term program will involve a site walk-through by a landscape architect or the equivalent on about a biweekly basis for at least 18 months after the initial restoration/enhancement activities begin. If the construction of the project takes longer than 18 months, the biweekly visits should extend at least nine months beyond the date of final construction. During the biweekly visits the dune areas will be examined and the following maintenance actions taken:

- A. Dead or dying replanted Type A or Type B vegetation will be removed and replaced as soon as possible.
- B. Areas of sand blow-out, or vegetation trampling will be noted and repaired/replaced.
- C. Any reoccurrence of exotic plants will be noted and all such plants removed, and, to the extent feasible, the area replanted with native dune species.

The long-term maintenance program will involve a site reconnaissance on a quarterly basis to assess blow-outs, trampling, wind damage, damage to public walkways and related signs, etc. Repairs and replanting will be made as soon as feasible, taking into consideration seasonal influences. The developer or an approved designee will continue the long-term maintenance program for a seven-year period after the completion of the project. The restoration areas will then be dedicated to an appropriate public agency, contingent on the restoration areas being in good, viable condition at the time of transfer.

Effectiveness of the long term viability of the dunes restoration plan will depend upon a responsible entity being assigned the responsibility for accomplishing the maintenance in a prudent and efficient manner. The developer currently proposes to dedicate the restoration areas to the State Department of Parks and Recreation.

### VIII. SEQUENCE OF RESTORATION EVENTS

The following sequence of restoration activities must be taken:

- A. The Developer must be bonded prior to initiation of construction or restoration activities;
- B. All Preservation areas will be fenced prior to the start of any construction activities on the site;
- C. All man-made structures will be removed, e.g., asphalt remnants [sic], old buildings, fences, etc.;
- D. Exotic plants, e.g., *Mesembryanthum spp.*, will be removed;
- E. Construction activities will begin;
- F. Areas which will be planted with native dune species will be restored as soon as feasible, i.e., as soon as major construction in the nearby areas is complete, to minimize the creation of major blowout areas; however, October through January is the preferred time for planting of dune species;

- G. Short-term, intensive maintenance activities will begin;
- H. Boardwalks and appropriate signs will be put in place;
- I. Long-term maintenance activities will continue for a seven year period; and
- J. All restoration areas will be transferred to a public agency, e.g., the California Department of Parks and Recreation.

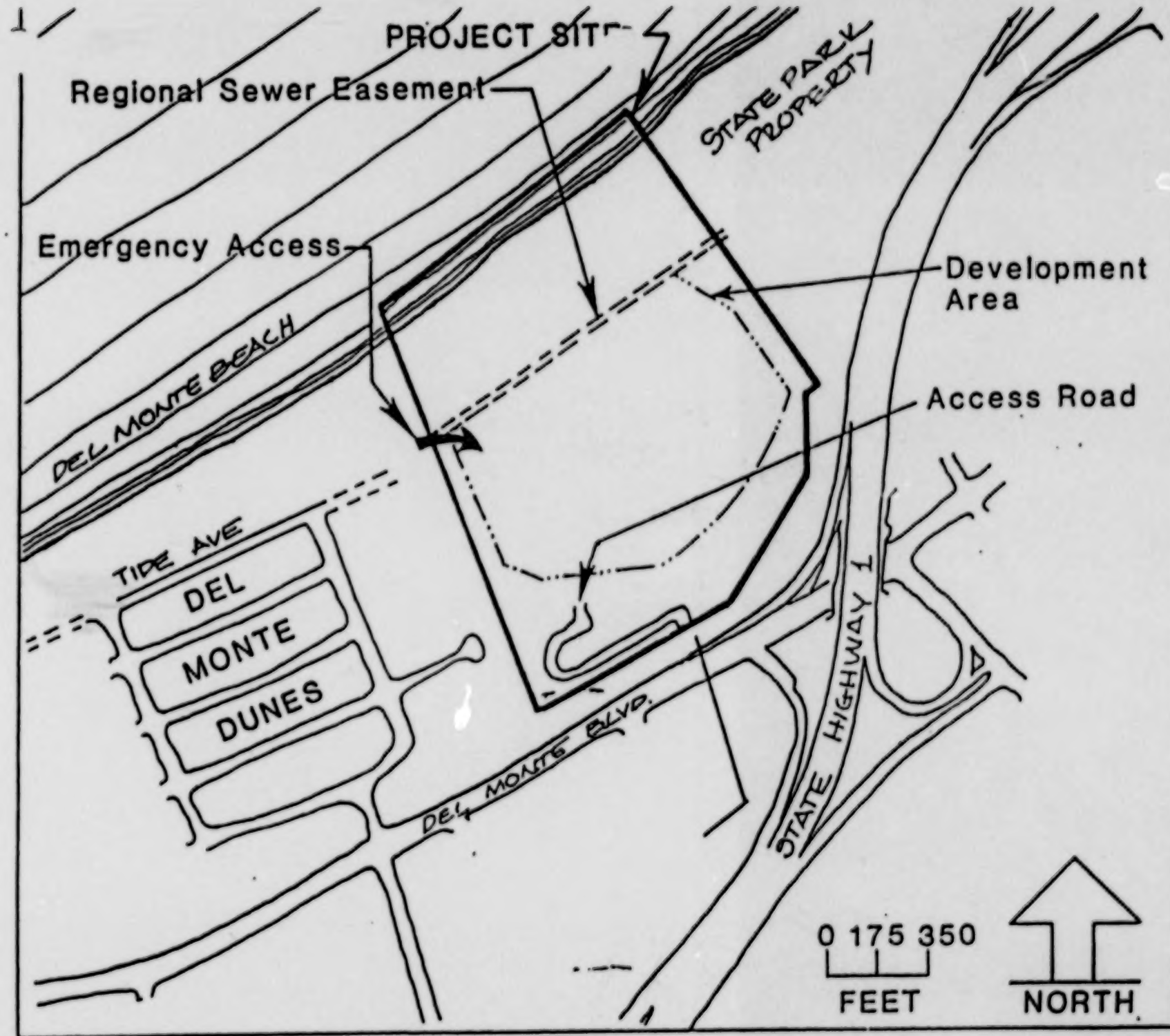
<u>SCIENTIFIC NAME</u>	<u>COMMON NAME</u>	<u>NATIVE OR INTRODUCED</u>
<i>Abronia umbellata</i>	Sand verbena	N
<i>Ambrosia chamissonis</i>	Silver beach weed	N
<i>Ambrosia sp.</i>		N
<i>Ammophilum arenaria</i>	European beach grass	I
<i>Artemisia douglasiana</i>	Mugwort	N
<i>Artemisia dracunculu</i>	Tarragon	N
<i>Artemisia pynoccephala</i>	Beach sagewort	N
<i>Baccharis pilularis</i>	Coyote bush	N
<i>Castilleja latifolia</i> *	Monterey paint- brush	N

\* Listed as rare but not endangered by California Native Plant Society (CNPS)

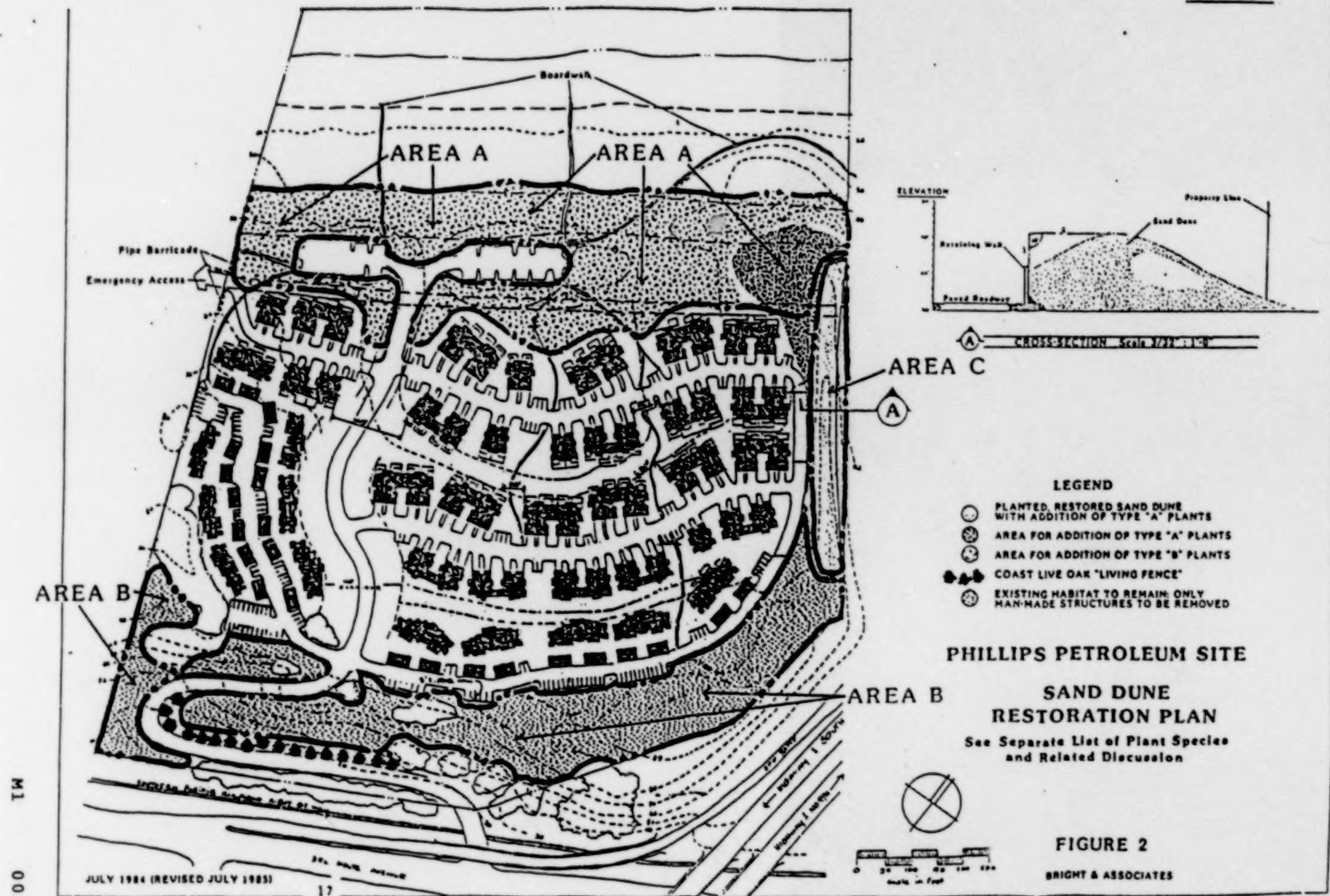


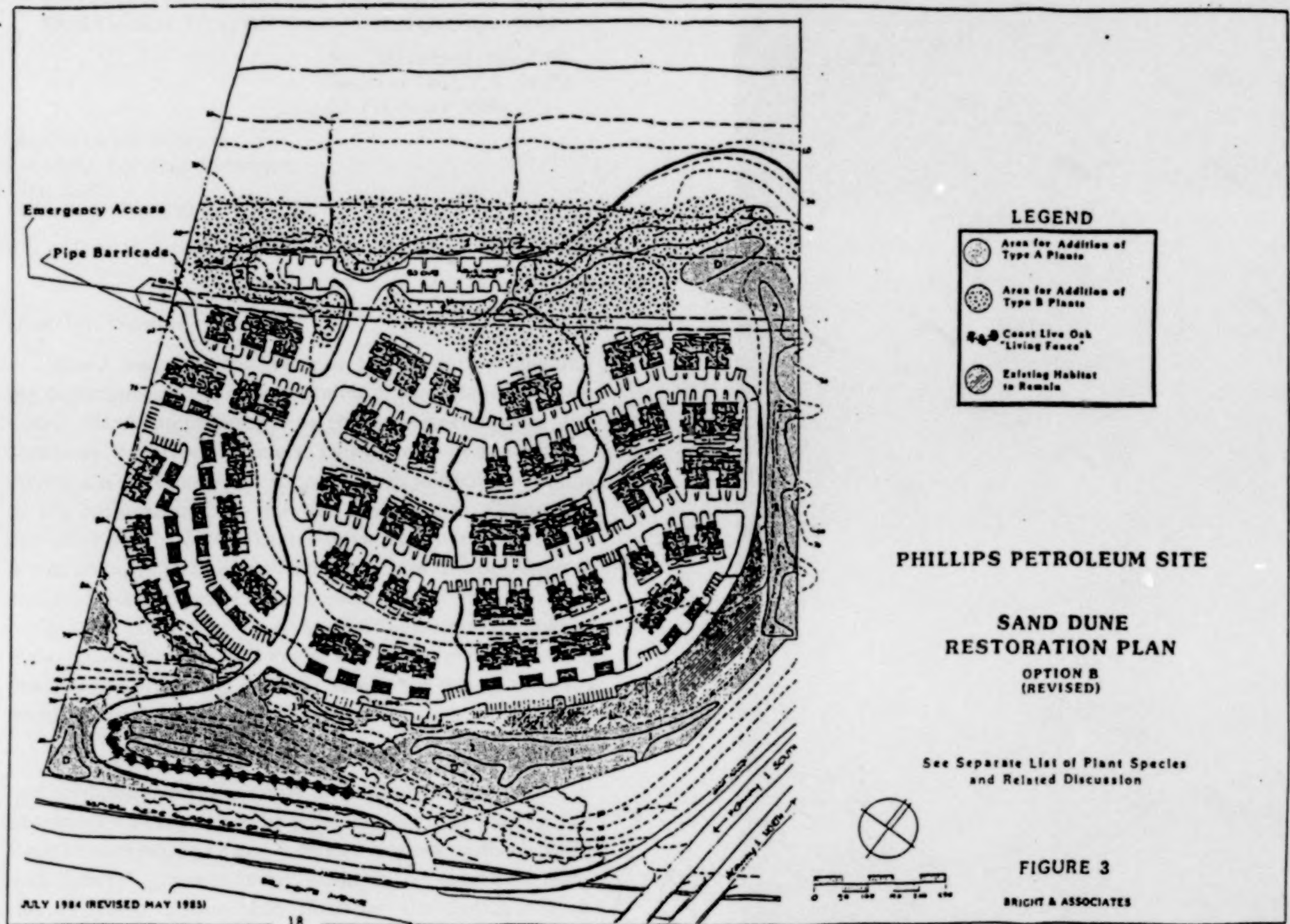
<i>Conium maculatum</i>	Poison Hemlock	N
<i>Convolvulus soldanella</i>	Beach morning glory	N
<i>Croton californicus</i>		N
<i>Dudleya caespitosa</i>	Live-forever	N
<i>Eucalyptus</i> sp.	Eucalyptus	I
<i>Eriogonum latifolium</i>	Buckwheat	N
<i>Franseria chamissonis</i>	Beach burr	N
<i>bipinnatisecta</i>		
<i>Haplopappus ericoides</i>	Heather golden-bush	N
<i>Heterotheca grandiflora</i>	Telegraph weed	N
<i>Lotus scoparis</i>	Deerweed	N
<i>Lupinus arboreus</i>	Bush Tupine	N
<i>Lupinus chamissonis</i>	Lupine	N
<i>Lupinus</i> sp.	Lupine	N
<i>Mesembryanthemum chilense</i>	Sea-fig	I
<i>Mesembryanthemum crystallinum</i>	Ice plant	I
<i>Mesembryanthemum edule</i>	Hottentot-fig	I
<i>Oenothera cheiranthifolia</i>	Beach primrose	N
var. <i>cheiranthifolia</i>		
<i>Oenothera cheiranthifolia</i>	Beach primrose	N
var. <i>nitida</i> **		
<i>Phacelia</i> sp.		N
<i>Poa douglasii</i>	Dune Grass	N
<i>Polygonum paronychia</i>	Beach knotweed	N
<i>Pteridium aquilinum</i>	Bracken Fern	N
<i>Quercus agrifolia</i>	Coast live oak	N
<i>Rhamnus purshiana</i>		N
<i>Rubus ursinus</i>	California Blackberry	N
<i>Solanum nodiflorum</i>		I
<i>Solanum umbelliferum</i>	Nightshade	N
<i>Tetragonia expansa</i>	New Zealand Spinach	I

\*\* Listed as rare by Abrams but not CNPS

**VICINITY MAP****FIGURE 1**









**UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)**

50 Cleaveland Road #2  
Pleasant Hill, CA 94523  
23 February 1986

Mr. Hayward Norton,  
Planning Services Manager  
City Hall  
Monterey, CA 93940

RE: Habitat Restoration Plan for Monterey Bay Dunes  
Project

Dear Mr. Norton:

Thank you for your letter of 14 February requesting my comments on the latest version of the "Habitat Restoration Plan" prepared by Bright & Associates for the Monterey Bay Dunes Project. I have reviewed the documents you sent me and compared them to earlier versions of the restoration plan for the project site. Although I note that Bright & Associates have incorporated several minor changes in their revised plan, I am disappointed to still find that the plan contains serious biological flaws, as outlined in my letter to you dated 6 Sept. 1985. Because of these flaws, the plan will *not* be able to achieve its desired objective of providing suitable habitat for the endangered Smith's Blue butterfly.

For the past ten years I have studied the Smith's Blue and its habitat requirements at a number of localities in Monterey County, including the project site. During this time I have worked closely with a variety of local, state, and federal governmental agencies to resolve coastal development issues that threaten the Smith's Blue. Although I have previously met with Dr. Bright and

outlined my concerns about this project, all versions of his "Habitat Restoration Plan" have largely ignored essential biological information necessary for proper [sic] protection, management, and enhancement of Smith's Blue habitat at the project site. For example, the footprint of the current plan will destroy about 90-95% of the existing habitat that now supports the butterfly at the project site. Destruction of habitat is a violation of the "take provision" of the Endangered Species Act. Even temporary loss of nearly all the existing habitat at the project site would probably result in extinction of Smith's Blue there and further disrupt dispersal of the butterfly between other small coastal populations that occur both north and south of the project site. Thus this action will not only threaten survival of the butterfly at the project site, but also threaten its survival at other nearby sites.

The butterfly's larval foodplant, *Erogonum latifolium* or buckwheat, has been increasing in numbers and areal extent at the project site in recent years, thereby substantially improving habitat quality for Smith Blue. Buckwheat is patchily distributed at the project site, but altogether now grows on about 2 acres. The "Habitat Restoration Plan" will destroy most of these patches, and then recreate native dune habitat on approximately 10 acres. Even if all existing habitat for the butterfly were protected, longterm survival of Smith's Blue would be suspect due to the small biomass of buckwheat on site. Considering the variety of plants that will be restored in the 10 acres, it seems unlikely that the buckwheat will

cover 20% of the restored area. Thus the amount of buckwheat growing in the "restored" habitat could actually be less than what now grows at the project site.

It appears that the corridor for butterfly dispersal has been widened slightly compared to earlier versions of the plan, but it will still impair free movement of Smith's Blue to and from the project site. The access road is as wide as the average flight of most individuals and poses a barrier to dispersal. The butterfly flies close to the ground and restricts its activities to sunny areas as it is cold-blooded. Addition of the living fence of oak trees and maintenance of existing eucalyptus trees will further restrict the movement of butterflies in the corridor. The free dispersal of Smith's Blue between and among colonies along this portion of the coast is essential for maintaining this endangered species as most colonies between Monterey and Ft. Ord are fairly small [sic] size and unable to sustain themselves without recruitment of new individuals.

To conclude, the project site serves as a crucial link in a chain of small, scattered Smith's Blue populations along the Del Monte Beach coastal zone. Bright's "Habitat Restoration Plan" will not only destroy nearly all habitat on the project site that presently sustains the butterfly, but will also probably extirpate the endangered butterfly's population now resident at the project site and further threaten its survival at nearby localities. The amount of protected habitat left at the project site, while additional dune habitat is "restored", will be inadequate to sustain the Smith's Blue for the several year period (perhaps 7-10 years) required to successfully restore the site. In the interim, Smith's blues will also find the project site to be



unacceptable as a stepping-stone for their dispersal. To alleviate these problems, the footprint of the development must be substantially reduced to provide more area for protection of existing habitat for the butterfly and restoration of additional dune habitat. The corridor must be greatly expanded, preferably several hundred feet wide, and should not contain major obstructions such as oak trees, which would interfere [sic] with the butterfly's normal behavior and hinder their dispersal. By following these guidelines, adverse effects of the development on the butterfly could be minimized.

Thank you for the opportunity to submit additional comments on this matter. If you have any questions about my comments, please feel free to contact me at the above address.

Sincerely,

/s/ Richard A. Arnold

Richard A. Arnold, Ph.D.

**UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)**

[SEAL]

United States  
Department of the Interior

Fish and Wildlife Service  
Lloyd 500 Building, Suite 1692  
500 N.E. Multnomah Street  
Portland, Oregon 97232

In Reply Refer To:

Your Reference:

February 24, 1986

Mr. Haywood Norton  
Planning Services Manager  
City of Monterey  
Monterey, California 93940

Dear Mr. Norton:

Thank you for your request of February 14, 1986, for our review of the habitat restoration plan for Monterey Bay Dunes. We have studied the "Summary of Restoration Activities" dated January 1986, provided with your letter as well as the "Del Monte Dunes Restoration Plan" dated February 1986 provided directly by Mr. Bright.

We are disappointed that the modifications to the project and restoration plan, suggested in our comments to the Veterans Administration on March 22, 1985, have not been adopted in these latest revisions. We emphasized to VA that the restoration plan had little chance for success given the complete destruction of presently existing habitat and the focus on marginal, currently unsuitable areas for rehabilitation. The most recent restoration concepts are little changed from the original and indicate no

increased benefit to Smith's blue butterfly in our view. Were the restoration plan a federal proposal we would not approve it, nor do we consider it consistent with our approved Recovery Plan for the species.

In our report to the Veterans Administration we noted that the endangered butterfly, along with its host plant, may be increasing its population size on the property. This has also recently been indicated in comments from Dr. Richard Arnold. Should VA request reinitiation of formal interagency consultation, we would re-evaluate whether federal loan guarantees continue to comply with the Endangered Species Act.

Sincerely yours,

/s/ William F. Shake  
William F. Shake  
Assistant Regional Director  
Federal Assistance

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**UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)**

**BRIGHT & ASSOCIATES**

1200 N. Jefferson, Suite B  
Anaheim, California 92807

(714) 632-8521

Telex 75-7635

Fax (714) 632-6754

March 14, 1986

Mr. Bill Wojtkowski  
Planning Director  
City of Monterey  
City Hall  
Monterey, CA 93940

Dear Mr. Wojtkowski:

Bright & Associates prepared the Restoration Plan for the proposed residential development in the Del Monte Dunes area of Monterey, California. The original Restoration Plan was prepared in July, 1984 and circulated for review. Changes have been made in the Restoration Plan (RP) due to public review and input from various agencies. The Final Restoration Plan, dated March, 1986, contains these changes. The following is a summary of the specific changes and differences between the original and final Restoration Plans.

1. The original RP suggested construction of 8-15' dunes which have been eliminated based on a recommendation from the Fish and Wildlife Service (FWS). Only one dune will be sculptured along the northeastern boundary of the property as a visual buffer to persons traveling on Highway 1. The height of this dune will be maintained per City requirements to assure that the visual barrier is maintained. No dune resculpturing will occur.



2. The use of snow fencing and jute matting were proposed in the original RP. These have been eliminated in the final RP to allow some sand migration which is desirable for efficient propagation in certain dune species.
3. The living fence of coastal live oak has been shortened to allow a potential corridor for migration of Smith's Blue Butterfly (SBB). There currently is no available corridor in this area since it is fenced, contains buildings, old tanks and mostly non-native plant species.
4. A temporary irrigation system was proposed in the original RP which has been eliminated in the final RP. Only a small amount of watering by hand will occur so that a more natural environment is created and so that the plants do not become water-dependent.
5. The type of plants to be used as part of the Restoration Plan has been expanded and may include plants which were common to the area in the past but which have since disappeared. A final plant list will be developed in consultation with the California Native Plant Society.
6. The non-native Eucalyptus trees will be removed under the proposed Final RP. They were proposed to remain under the original RP.
7. The long-term maintenance plan has been developed in more detail in the Final RP. A short-term intensive maintenance effort is proposed for at least 18 months after initial

restoration/enhancement activities begin which will include bi-weekly walkthroughs of the area by a qualified individual. The long-term maintenance program will involve a site reconnaissance on a quarterly basis to assess blow-outs, trampling, wind damage, damage to public walkways and related signs, etc. The restoration areas will be dedicated to an appropriate public agency, contingent on the restoration areas of being in good, viable condition.

8. The length of the access road has been reduced in the final RP to allow almost the entire backdune to remain in its existing condition and be enhanced by the removal of iceplant and the additional [sic] of native plants.
9. A large area along the northeastern boundary of the property was removed from development and added to the Restoration Plan area in the final RP. This area will remain in its existing state. This area (Area B, Figure 2 of the final RP) was added due to the existence of viable natural habitat and numerous buckwheat plants. Further, it may provide a potential corridor for butterfly migration between various habitats up and down the coast. This is a significant benefit to the SBB because no corridor currently exists in this area.
10. A larger area has been included for restoration activities in the Final RP in front of the proposed parking area than in the original RP.
11. The access alternative has been determined by the City so the discussion on access

alternatives has been eliminated in the Final RP.

There are two additional general changes reflected in the Final Restoration Plan: (1) The Final Plan incorporates City requirements regarding view vistas, location of primary access, balanced cut and fill and so forth, and the fact that the City Council already established the number of allowed units; and (2) the content of the March 22 1985 letter from Bill Shake, Fish and Wildlife Service to Virgle Cockrum, Veterans Administration indicating that if the proposed project proceeds it "is not likely to jeopardize the continued existence of the Smith's Blue Butterfly" and that losses of Smith's Blue Butterflies "will be small and of little consequence to the species as a whole if the project is constructed."

Considering the above, we believe that the responses to the comments from all the agencies have been incorporated to the extent feasible in the Final Restoration Plan.

Please call if you have any questions or comments.

Sincerely,

BRIGHT & ASSOCIATES

/s/ Debra Bright/for  
Donald B. Bright

DBB:DAB:vc

cc: D. Spence  
P. Davis

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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)

31 March 1986  
50 Cleaveland Rd. #3  
Pleasant Hill, CA 94523

Mr. Haywood Horton  
Planning Services Manager  
City Hall  
Monterey, CA 93940

RE: Habitat Restoration Plan for Monterey Bay Dunes  
Project

Dear Mr. Norton:

Thank you for your recent request for additional comments on the Habitat Restoration Plan (HRP) prepared by Bright & Associates for the Monterey Bay Dunes Project. I recently received a copy of the Final HRP from Bright & Associates.

I have carefully reviewed the Final HRP and compared its contents to earlier versions. As in my reviews of earlier versions, I noted several minor changes in the Final HRP. However, the Final HRP still does *not* properly address any of the biological issues raised in my letters dated 6 Sept. 1985 and 23 Feb. 1986. Since essential information relevant for proper conservation and management of the endangered Smith's Blue butterfly is being ignored, the Final HRP will *not* be able to achieve its desired short- and long-term objectives. Furthermore, the Final HRP, in its present form, will establish a bad precedent for resolving similar land-use conflicts where the endangered butterfly's habitat occurs in the greater Monterey area. As I



stated in my earlier letters, if the footprint of the development was substantially reduced to provide more area for protection of existing habitat and restoration of additional habitat at the project site, then we could better mitigate the adverse effects of the proposed development on the butterfly.

Thank you for the opportunity to provide additional comments on this matter.

Sincerely,

/s/ Richard A. Arnold  
Richard A. Arnold

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**UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)**

[LOGO] United States  
Department of the Interior

Fish and Wildlife Service  
Lloyd 500 Building, Suite 1692  
500 N.E. Multnomah Street  
Portland, Oregon 97232

In Reply Refer To:

Your Reference:

April 2, 1986

Mr. Haywood Norton  
Planning Services Manager  
City of Monterey  
Monterey, California 93940

Dear Mr. Norton:

This confirms the telephone conversation you had with Mr. Wayne White of my staff on March 25, 1986, regarding our February 24, 1986 letter to you. As stated to you during the telephone conversation, please disregard our February 24, 1986 letter. This letter will constitute our comments on your request of February 14, 1986, for our review of the habitat restoration plan for Monterey Bay Dunes.

In reviewing the plan we noted no significant change in the overall project relative to our authorities and review under Section 7 of the Endangered Species Act. As such, the conclusion stated in our Biological Opinion of March 22, 1985 to the Veterans Administration are unchanged. The project as proposed is not likely to jeopardize the

continued existence of the endangered Smith's blue butterfly. Our incidental take measures and conditions also stand as previously stated.

Sincerely,

/s/ William F. Shake  
William F. Shake  
Assistant Regional Director  
Federal Assistance

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**UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)**

STATE OF CALIFORNIA-THE RESOURCES AGENCY  
GEORGE DEUKMEJIAN, Governor

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DEPARTMENT OF FISH AND GAME [LOGO]  
POST OFFICE BOX 47  
ILLEGIBLE, CALIFORNIA 94599  
ILLEGIBLE44-2011

April 18, 1986

Mr. Haywood Norton  
Planning Services Manager  
City of Monterey  
Monterey, CA 93940

Dear Mr. Norton:

This letter is in regard to the Restoration Plan for the Monterey Bay Dunes area. We have reviewed the April 2, 1986 letter from the U.S. Fish and Wildlife Service to you and we concur with the Service's findings and recommendations.

Sincerely,

/s/ Brian Hunter  
Brian Hunter  
Regional Manager  
Region 3

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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)

[LOGO] United States  
Department of the Interior

Fish and Wildlife Service  
Lloyd 500 Building, Suite 1692  
500 N.E. Multnomah Street  
Portland, Oregon 97232

In Reply Refer To:

Your Reference:

May 5, 1986

Ms. Joyce Stevens  
Coastal Committee  
Sierra Club  
P.O. Box 5667  
Carmel, California 93921

Dear Ms. Stevens:

Thank you for your letter of April 25, 1986, and accompanying map overlay of the Phillips site and Del Monte Dunes housing.

You are correct that we continue to endorse our position as stated in our Biological Opinion to Veterans Administration (attached). That Opinion was prepared with a full awareness of Dr. Arnold's views and several letters over the last few years. The City of Monterey has a copy of that Opinion and we hope it will not be mis-construed as approval of the project or the restoration plan. Our position has been clearly stated - the project will destroy most, if not all, of the Smith's blue butterflies (SBB) and their host plants on the site (p. 6), and the final restoration plan will not likely succeed in replacing lost habitat or preserving SBB at that location (p. 10).

Some dichotomy exists regarding our responsibilities under the Endangered Species Act and our review of this project. Section 7 of the ESA requires us to decide whether a federal action (VA home loan guarantees/loans) is likely to jeopardize the continued existence of a listed species (SBB). This involves a determination of whether the chances for *both* survival and recovery of the species in the wild (not just the Phillips site) will be appreciably reduced by the proposed federal action. Given the admittedly limited biological information on the SBB at the Phillips site in 1985, and the existence of numerous other colonies (see attached Recovery Plan), we could not rationally conclude that the entire species would be jeopardized by this action. However, we did emphasize that this site, identified as necessary for recovery and eventual delisting of the species, would be irretrievably lost. This, however, is not sufficient to invoke the prohibitions of Section 7.

To respond to an important point you raised, our Opinion considered the value of the site as a "corridor" for SBB dispersal (p. 9). While recognizing the existence of about 1000 host plants, we emphasized that the importance of the site as a corridor was speculative. Our Recovery Plan states only that this site "may" be critical, but is nevertheless unequivocal that the site should be preserved as a element of recovery.

Our Opinion also suggested modifications to the project design that we think appropriate to preserve SBB and its habitat on the site. With these modifications, a restoration plan along the lines of that proposed could probably

succeed since it would build on preservation and enhancement of existing SBB habitat. We hope local government will consider these suggestions in light of their own responsibilities to conserve endangered species.

Sincerely yours,

/s/ William F. Shake  
William F. Shake  
Assistant Regional Director  
Federal Assistance

Enclosures

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**UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)**  
STATE OF CALIFORNIA—THE RESOURCES AGENCY  
GEORGE DEUKMEJIAN, Governor

DEPARTMENT OF FISH AND GAME [LOGO]  
POST OFFICE BOX 47  
ILLEGIBLE, CALIFORNIA 94599  
ILLEGIBLE44-2011

June 3, 1986

Mr. Haywood Norton  
Planning Services Manager  
City of Monterey  
Monterey, CA 93940

SUBJECT: Del Monte Dunes of Monterey Project

Dear Mr. Norton:

This letter responds to your recent request to Mr. Elliott in our Monterey office for a clarification of the Department's views on the subject project.

The Department continues to be committed to the protection of the Smith's blue butterfly and the preservation of its habitat. We regard the occurrence of either adult or larval forms of the butterfly on a site with the host buckwheat plants as an indication of viable habitat worthy of species protection. We concur with the City of Monterey's Planning Commission Conditions of Approval for the project wherein it states that "... the developer shall preserve the existing habitat" and in the habitat protection policies in the Del Monte LUP wherein specific mention of the Smith's blue butterfly is clearly stated in Environmentally Sensitive Habitat Areas Policy 3, quoted as follows: "3. All environmentally sensitive habitat shall be protected". Our point in re-stating the



latter is that while we are aware that the same section goes on to mandate that revegetation with wild buckwheat "shall be" included as part of the dune restoration program for any development to enhance habitat for the Smith's blue butterfly, both the LUP and the City of Monterey Planning Commission Conditions of Approval also clearly state a definite requirement for protection of the *existing* habitat.

The Department believes that the reference material submitted by the Sierra Club at the recent May 6 meeting in Monterey accurately and objectively illustrates the precise location of buckwheat species on the project site. The overlay accompanying this material clearly demonstrates those areas most appropriate for any building construction which would avoid the critical habitat areas defined by City and LUP policy as mandated for complete protection.

Sincerely,

/s/ Brian Hunter  
Brian Hunter  
Regional Manager  
Region 3

BH:dcm

## ATTACHMENT A

### BACKGROUND SUMMARY

#### HABITAT RESTORATION PLAN DEL MONTE DUNES OF MONTEREY PROJECT

A Habitat Restoration Plan for the Del Monte Dunes of Monterey Project has been prepared in response to Conditions 3 and 4 of the City of Monterey Planning Commission's Conditions of Approval for the project. Conditions 3 and 4 read as follows:

3. *SMITH'S BLUE BUTTERFLY*: Prior to final map or any construction, whichever occurs first, the developer shall preserve the existing habitat, in line with habitat protection policies in the Del Monte Beach Land Use Plan. The habitat preservation shall be reviewed by California Department of Fish and Game and U.S. Fish and Wildlife Service and the City of Monterey. Any significant changes to the site plan as a result of that review will require an approval by the City of Monterey and may require resubmittal of Tentative Map.
4. *RARE AND ENDANGERED PLANTS*: All rare and endangered plants shall be preserved in line with the habitat protection policies in the Del Monte Beach Land Use Plan. The rare and endangered plant preservation program shall be reviewed by the California Native Plant [sic] Society, and approved by the City of Monterey.

The habitat protection policies in the Del Monte Beach LUP are listed in Attachment C. Specific mention of the Smith's Blue Butterfly is made in Environmentally Sensitive Habitat Areas Policy 3 in the LUP, and is as follows:

3. All environmentally sensitive habitat shall be protected. Revegetation with wild buckwheat

(*Eriogonum latifolium* or *Eriogonum parvifolium*) shall be included as part of the dune restoration program for any new development to enhance habitat for the Smith's Blue Butterfly.

Attachment B presents, in chronological order, correspondence addressing the Habitat Restoration Plan. The Habitat Restoration Plan has been reviewed by the California Department of Fish and Game and the U.S. Fish and Wildlife Service. Fish and Wildlife's most recent response is in the letter dated April 2, 1986 (in Attachment B) and Fish and Game's response is in the letter dated April 18, 1986 (in Attachment B). Fish and Game's letter states that it agrees with Fish and Wildlife's letter.

The April 2, 1986 letter from the U.S. Fish and Wildlife Service signed by Assistant Regional Director William Shake states that, under Section 7 of the Endangered Species Act, the Del Monte Dunes of Monterey Project will not jeopardize the continued existence of the endangered Smith's Blue Butterfly. As indicated in a March 26, 1986 memo (in Attachment B), Section 7 of the Endangered Species Act is limited to consideration of the species as a whole and not on a site-by-site basis. In letters in Attachment B dated March 22, 1986 and February 24, 1986 from Fish and Wildlife, statements are made that the Monterey illegible Dunes project, as sited, and the Habitat Restoration Plan, as proposed, could have little chance of success in providing for the continued existence of

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**DELMONTE DUNES AT MONTEREY, LTD., AND  
MONTEREY-DEL MONTE DUNES CORPORATION v.  
CITY OF MONTEREY**

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

PAUL DAVIS-DIRECT\JACOBSEN

[p. 88] THERE'S SOMEWHERE AROUND 12 TO 18 INCHES OF OIL-SOAKED SAND THAT WAS THERE, AND NOTHING WAS GROWING IN THAT AREA, AS WELL AS A LOT OF PIPES THAT CONNECTED THESE TANKS TOGETHER UNDERNEATH, SOME OF THEM STICKING UP BECAUSE WHEN THEY PULLED SOME OUT, THEY LEFT OTHERS.

BASICALLY, IT'S A LEFT OVER SITE FROM THE ORIGINAL TANK FARM. BUT A LOT OF THE DEBRIS WAS STILL THERE. CHUNKS OF CONCRETE IN PLACES, OLD PIECES OF PIPE OF DIFFERENT SIZE THAT WAS ON THE SITE.

Q. LET ME GO BACK TO 158-C AND ALSO I HAVE 158-A IN FRONT OF ME NOW. THERE IS IN THE LOWER PORTION ON THE HIGHWAY HERE SOME - A SMALL BUILDING, AND IT LOOKS LIKE SOME TANKS APPEAR.

IS THAT PART OF THE SUBJECT PROPERTY?

A. YES.

Q. THERE'S SOME REFERENCE TO FACILITIES YARD THAT WE WILL SEE IN THE DOCUMENTS.

WHAT IS THIS AREA OF THE SUBJECT PROPERTY DOWN HERE?



A. THAT WAS ORIGINALLY AN AREA WHERE THERE WAS LOADING AND OFFLOADING, APPARENTLY WHERE TRUCKS CAME IN AND LOADED UP WITH GAS OR OIL AND WENT TO THEIR DESTINATION. IT WAS BASICALLY WHERE THAT WAS DONE.

THERE ARE SOME TANKS HERE, SOME OUTBUILDINGS, A WAREHOUSE, SOME PAVING, AND IT HAS DIRECT ACCESS OFF OF DEL MONTE BOULEVARD.

\* \* \*

[p. 91] Q. WE HAVE HEARD REFERENCE IN THE OPENING STATEMENTS TO CITY REGULATIONS, SUCH AS GENERAL PLAN AND ZONING THAT GOVERN PROPERTY. AT THE TIME YOU WERE RETAINED IN 1981 BY PHILIPS - BY PONDEROSA - WAS THE SUBJECT PROPERTY GOVERNED BY VARIOUS CITY GENERAL PLAN AND ZONING AND OTHER LAND USE REGULATIONS?

A. YES.

Q. DID THOSE REGULATIONS SPECIFY THE MAXIMUM DENSITY THAT COULD BE DEVELOPED ON THE SUBJECT PROPERTY?

A. YES.

Q. WHAT WAS THAT MAXIMUM DENSITY AS OF 1981?

A. THAT DENSITY WAS AN R-4 ZONING WHICH ALLOWED A DENSITY OF 29 UNITS PER ACRE. SO TAKING 29 UNITS TIMES THIRTY-SEVEN AND A HALF ACRES IS SOMEWHERE IN EXCESS OF 900

UNITS THAT WOULD BE POSSIBLE UNDER THE ZONING.

\* \* \*

[p. 93] Q. WE WILL GET INTO THIS AS WE GET TO SOME OF THE PLANS, BUT WHEN YOU WERE PREPARING THESE VARIOUS PROPOSALS FOR THE CITY, WOULD YOU ACTUALLY GO TO THE CITY PLANNING STAFF AND ASK THEM WHAT THEY THOUGHT ABOUT VARIOUS MATTERS?

A. YES.

Q. DID YOU DO THAT WITH SOME FREQUENCY? IF THE CITY PLANNING STAFF, AFTER YOU PRESENTED SOMETHING TO THEM, SAID, "WE WOULD LIKE YOU TO CHANGE IT AND DO IT A DIFFERENT WAY," WOULD YOU FOLLOW THE STAFF'S RECOMMENDATION?

A. YES.

Q. WITHOUT EXCEPTION?

A. I DON'T REMEMBER AN EXCEPTION THAT WE DIDN'T FOLLOW THE CITY ENTIRELY. WE WORKED WITH THE CITY AND THEIR CONCERNS.

\* \* \*

[p. 97] WAS THERE GOING TO BE PUBLIC ACCESS TO THE BEACH UNDER THIS 344-UNIT PROPOSAL?

A. YES. THERE WAS TO BE ALLOWED PUBLIC ACCESS TO THE BEACH DOWN THROUGH HERE AND PARKING HERE. AND THEN BECAUSE OF THE FACT THAT WE WOULD PLANT THIS IN NATIVE

BEACH VEGETATION AND SO IT WOULDN'T BE DISTURBED, THERE WOULD BE WALKS, BOARDWALKS, THAT WOULD GO THROUGH THAT TO ROUTE PEOPLE THROUGH THE NATURAL PLANTED AREA.

Q. SO EFFECTIVELY, TO KEEP THEM OFF THE GRASS?

A. YES, THAT'S RIGHT, OFF THE PLANTS.

Q. THERE IS A PARKING LOT SHOWN HERE.

WAS THAT GOING TO BE FOR THE BENEFIT OF THE RESIDENTS OR PUBLIC?

\* \* \*

[p. 106] Q. LET ME, IF I MIGHT, REFER YOU, MR. DAVIS, TO EXHIBITS 9 AND 10, WHICH FOR THE RECORD EXHIBIT 9 IS A SEPTEMBER 20, 1982 LETTER TO MR. DAVIS FROM THE CITY OF MONTEREY FIRE PREVENTION MANAGER AND SEPTEMBER 30, 1982, MEMO TO THE CITY MANAGER FROM THE COMMUNITY DEVELOPMENT DIRECTOR.

IS THAT THE PLANNING DIRECTOR, MR. DAVIS?

A. YES.

Q. DO YOU RECOGNIZE THOSE EXHIBITS?

A. YES.

Q. JUST FOR THE JURY'S INFORMATION, DO THOSE CITY DOCUMENTS INVOLVE ACCESS TO THE PROPERTY?

A. YES.

Q. BOTH OF THEM DO?

A. YES, THEY DO.

Q. THEY ARE BOTH ROUGHLY - ONE IS IN SEPTEMBER '82 - BOTH IN SEPTEMBER OF 1982?

A. THAT'S RIGHT.

Q. EVEN BEFORE YOU CAME UP FOR YOUR FIRST REVIEW, THEN, WAS THE CITY TALKING TO YOU ABOUT ACCESS THOUGH THIS PROPERTY IN TERMS OF DEVELOPMENT?

\* \* \*

[p. 120] Q. DID YOU, IN REDUCING THE DENSITY FROM 344 TO 264, DID YOU DO THAT AFTER CONSULTATION WITH CITY OFFICIALS?

A. YES, VERY MUCH SO. WHERE THE EXISTING DENSITY OF THE LAND WAS ALLOWED AT 29 UNITS PER ACRE, THERE WAS A CONSENSUS OF OPINION THAT SEVEN UNITS PER ACRE WOULD BE A BETTER RATIO.

Q. CONSENSUS AMONG CITY REPRESENTATIVES?

A. A CONSENSUS AMONG THE CITY REPRESENTATIVES, THE ELECTED OFFICIALS, AND IN FACT THAT BECAME THE WRITTEN IN DENSITY ALLOWED IN THE LOCAL COASTAL PLAN, THAT SEVEN UNITS PER ACRE WAS THE AGREED UPON DENSITY IN THAT AREA. IN OTHER WORDS, IT SHOULD BE CHANGED FROM 29 DOWN TO SEVEN UNITS PER ACRE AND SEVEN UNITS PER ACRE EQUATED OUT TO 264 UNITS.



Q. YOU HAVE UNDER LAND CATEGORY 37.6 ACRES. THAT IS THE SIZE OF THE ENTIRE PARCEL?

A. YES.

Q. THEN 7.0 UNITS PER AC?

A. PER ACRE.

Q. AND THE 264 MULTIPLIES THIRTY-SEVEN AND A HALF TIMES SEVEN?

A. THAT'S CORRECT.

\* \* \*

[p. 125] Q. LET ME GO BACK TO YOUR 264 HERE. WE HAVE KIND OF GONE THROUGH THIS ON THE 344.

DID IT STILL PROVIDE FOR PUBLIC ACCESS TO THE BEACH?

A. YES. IF YOU CAN SEE ON THE RIGHT SIDE, WE HAD A DRIVE THAT WENT DOWN THE PROPERTY LINE WITH A CUL-DE-SAC AT THE END AND WITH PUBLIC PARKING THERE.

Q. THE PARKING LOT HERE IS ON THE BORDER IT SHARES WITH THE STATE PARK?

A. YES.

Q. SO THAT HAD AT LEAST BEEN MOVED FROM YOUR OTHER?

A. THAT'S RIGHT. I MIGHT SAY, TOO, THAT WE WERE IN CONTINUAL DISCUSSION THERE WITH WHERE WOULD BE THE BEST PLACE TO LOCATE

THAT, ON THE SIDE OF THE PROPERTY, MIDDLE OF THE PROPERTY, AND THERE WAS CHANGING ATTITUDES ON THAT. AND WE WERE - AT THAT TIME APPARENTLY IT WAS FELT IT SHOULD BE ADJACENT TO STATE PARKS.

Q. IT WAS FELT BY WHOM?

A. I'D SAY PROBABLY A COMBINATION OF CITY AND COASTAL COMMISSION STAFF.

I MIGHT MENTION THAT DURING THESE LOCAL COASTAL PLAN MEETINGS WITH THE CITY, EVEN THOUGH THE CITY HELD IT, THERE WERE ALWAYS COASTAL COMMISSION STAFF THERE FOR INPUT OF HOW THEY SAW THE COASTAL ACT BEING INTERPRETED IN MONTEREY'S PLAN.

\* \* \*

[p. 130] Q. DID YOU APPEAL THAT DENIAL?

A. YES.

Q. DID YOU COME BEFORE THE CITY COUNCIL IN APPROXIMATELY JANUARY OF 1984?

A. YES.

Q. WHAT HAPPENED AT THAT HEARING, TO YOUR RECOLLECTION, IN JANUARY OF 1984?

A. AS I REMEMBER, WE WERE TOLD THAT WE SHOULD MAKE SOME MODIFICATIONS. ONE WAS, I BELIEVE, PULLING BACK BEHIND THE SEWER LINE EASEMENT AND NOT HAVING ANY DEVELOPMENT

ON THE OCEAN SIDE OF THE SEWER LINE EASEMENT AND TO LOWER OUR NUMBER DOWN TO ABOUT 225.

\* \* \*

[p. 138] Q. 150 TO 190?

A. YES. BUT THEY ACTUALLY SAID COME BACK TO THE PLANNING COMMISSION AT 190 UNITS.

Q. THAT IS WHAT THE COUNCIL SAID WAS 190?

A. YES, 190.

Q. DID YOU GO BACK AT THAT POINT, THEN, AND REDESIGN THIS PROJECT ONCE AGAIN FOR 190 RESIDENTIAL UNITS?

A. YES. I MIGHT ADD THAT THE COUNCIL ALSO AMPLIFIED UPON THIS AND SAID THAT GOING FROM 224 TO 190 REPRESENTED A 15-PERCENT REDUCTION, AND THEY WANTED A CORRESPONDING 15-PERCENT REDUCTION IN SQUARE FOOTAGE. THEY DIDN'T WANT US [p. 140] TO HAVE JUST FEWER BIGGER UNITS, BUT THEY WANTED THE SIZE, OVERALL SQUARE FOOTAGE, TO BE CUT PROPORTIONATELY. SO THERE WAS SOME GUIDANCE TO HOW THIS 190 UNITS SHOULD BE APPORTIONED ON THE SITE.

Q. SO GOING FROM - WHEN THE COUNCIL WENT FROM 224 TO 190, THEY DID THAT BY MEANS OF A MATHEMATICAL FORMULA OF A 15-PERCENT REDUCTION?

A. YES.

Q. BUT THEY WANTED 15 PERCENT REDUCED IN FLOOR AREA OR SQUARE FOOTAGE?

A. FLOOR AREA, WHICH IS SQUARE FOOTAGE.

\* \* \*

[p. 145] Q. YOU HAVE TAKEN THE ROAD AWAY FROM THE STATE PARKS SIDE, BUT YOU HAVE ALSO TAKEN ANY ACCESS OR PARKING OFF THERE.

DID THE COASTAL COMMISSION STAFF REQUEST YOU TO DO THAT, TOO?

A. YES. THEY FINAL [sic] DECIDED THAT WOULD BE TOO DAMAGING TO THE PROPERTY. NOT NATURE TERRAIN. IT WOULD BE BETTER TO KEEP THIS NATURE BLUFF HERE, NATURAL BLUFF HERE AND HAVE ONE ACCESS, INCREASE THE PARKING HERE. WE HAVE 50 PARKING SPACES AND HAVE THIS BE THE MAIN AREA. THAT IS WHY WE CAME UP WITH THIS WIDENED ROAD COMING IN.

SO YOU REALLY HAD A SENSE THAT YOU WERE COMING INTO AND GOING THROUGH KIND OF AN OPEN SPACE AREA AND THIS BE KIND OF A GENEROUS CORRIDOR LEADING DOWN WITH A FULL VIEW OF THE OCEAN. SO IT WOULD BE VERY DRAMATIC SO THAT YOU INCREASE THIS WHOLE EXPERIENCE OF PUBLIC ACCESS AND MAXIMIZE IT.

Q. IN PREVIOUS PROPOSALS YOUR ENTRYWAY WAS NARROWER THAN IN THE 190, CORRECT?

A. YES.

Q. WHO ASKED YOU - WHOSE IDEA WAS IT TO WIDEN THIS ACCESS SO THAT PEOPLE WOULD GET



A MORE OPEN SPACE FEEL AS THEY WENT THROUGH THE PROPERTY?

A. IT WAS KIND OF IN BETWEEN THE PLANNING COMMISSION AND THE [p. 146] ARCHITECTURAL REVIEW COMMITTEE. WE WERE WORKING WITH BOTH. WE HAD STUDY SESSIONS WITH THE PLANNING COMMISSION, AND I DON'T REMEMBER WHETHER THE IDEA STARTED WITH THEM. IT PROBABLY DID START WITH THEM. AND IT WAS SORT OF CARRIED OUT IN TERMS OF HOW WIDE THAT SHOULD BE BY GOING THROUGH THE ARCHITECTURAL REVIEW COMMITTEE.

\* \* \*

Q. WE HAVE INDICATED BEFORE THE STATE PARK OWNS THE LAND OVER TO THE EAST AWAY FROM TOWN BORDERING THIS PROPERTY, CORRECT?

A. YES.

Q. IN DISCUSSING THIS PROPOSAL, 190 UNITS, WITH THE COASTAL COMMISSION STAFF AND THE CITY OF MONTEREY REPRESENTATIVES, WAS THERE ANY CONSIDERATION GIVEN TO THE RELATIONSHIP BETWEEN THE STATE PARK LAND AND WHAT YOU WERE PROPOSING HERE?

A. WELL, BECAUSE OF THE FACT THAT THEY WERE STILL IN THEIR PLANNING PROCESS AND DIDN'T KNOW EXACTLY WHAT THEY WERE GOING TO DO, THAT WE WOULD STAY AS FAR AWAY AS

POSSIBLE JUST TO PROVIDE A BUFFER. SO WHATEVER THEY DID OVER HERE THERE WOULD BE KIND OF THIS BUFFER AREA.

THAT'S WHY WE HAVE THIS FAIRLY SIGNIFICANT SETBACK IN THIS EASTERN BOUNDARY THAT IS ALL PART OF THIS GENERAL OPEN SPACE AREA.

\* \* \*

[p. 151] Q. YOU MENTIONED EARLIER THAT AMONG OTHER THINGS THE CITY POLICIES AND REGULATIONS WERE CONCERNED WITH PUBLIC USE OF THE BEACH AND ACCESS AND THE LIKE.

WERE THERE ALSO PUBLIC POLICIES BY THE CITY OF MONTEREY CONCERNING VISUAL ASPECTS OF THIS PROJECT?

A. YES.

Q. CAN YOU DESCRIBE FOR THE JURY IN GENERAL WHAT THOSE WERE?

A. THERE WAS LIMITATION IN TERMS OF HEIGHT OF BUILDINGS. AND I REMEMBER, I BELIEVE, THEY HAD TO STAY TWO STORY, 25 FEET MAXIMUM HEIGHT. THEY HAD TO BE POSITIONED IN THE BOWL SO THEY WOULD NOT BE SEEN EITHER FROM HIGHWAY 1 OR DEL MONTE BOULEVARD.

SO IN ESSENCE, WE HAD TO MAKE SURE THAT WE LOWERED OR THAT THE BOWL WAS LOW ENOUGH AND BASICALLY TERRACED AS WE SITED THOSE VARIOUS ROWS MOVING DOWN THE BOWL TO LOCATE THE UNITS SO THEY WOULD NOT BE

SEEN. THEY WOULD BE SHIELDED OR SCREENED VISUALLY FROM THE DUNE AT THE TOP TO THE SOUTH OR TO THE TOP OF THE DUNE TO THE EAST.

THERE WAS SOME CONSIDERATION THAT WE MAY HAVE TO DO SOME EXTRA MOUNDING ON THE TOP OF THAT DUNE TO SUPPLEMENT [p. 152] THAT. THAT WAS ALLOWED. BUT IT WAS THAT WE HAD TO WORK OUT WITH THE ARCHITECTURAL REVIEW COMMITTEE TO MAKE SURE WE SATISFIED THAT REQUIREMENT.

Q. AFTER COMPLYING WITH THESE CITY POLICIES THAT REQUIRED THIS BEACH FRONT AND NOT BUILDING SEAWARD, THE SEWER EASEMENT, AND STAYING AWAY FROM STATE PARKS AND THE HABITAT AND THAT, HOW MUCH FLEXIBILITY WAS THERE IN TERMS OF WHERE YOU COULD PUT THE UNITS?

A. NOT A LOT, BECAUSE WE WERE REALLY LIMITED IN TERMS OF FOOTPRINT AREA BECAUSE OF THOSE CONSTRAINTS AND THE FACT WE HAD TO PROVIDE FOR PARKING, STREET ACCESS. BESIDES THE PUBLIC ACCESS PARKING, WE HAD TO PROVIDE FOR PARKING REQUIREMENT OF THE CITY IN TERMS OF THE UNITS, GUEST PARKING FOR THOSE PEOPLE, REASONABLE STREET DIMENSIONS AND ACCESS FOR IN AND OUT IN TERMS OF PARKING MANEUVERING, REASONABLE SETBACKS BETWEEN BUILDINGS. THOSE VIEW CORRIDORS.

SO THERE WAS A LOT OF CONSTRAINTS THAT WE HAD TO WORK WITH, AND WE WERE WORKING

BETWEEN THE PLANNING COMMISSION AND THE ARCHITECTURAL REVIEW COMMITTEE.

Q. THE JURY HAS SEEN THESE PICTURES WHERE YOU CAN SEE THE IMPRINT OF THESE OLD TANK SITES.

A. YES.

Q. IS MOST OR ALL OF THIS ACTUAL DEVELOPABLE [sic] AREA, AS YOU CALL IT, IN THE BOWL WHERE THOSE TANK SITES WERE?

A. YES.

[p. 153] Q. YOU DIDN'T GO OUTSIDE THAT AREA?

A. NO. THAT'S ONE OF THE THINGS THIS PLAN CAME DOWN TO - BASICALLY KEEPING THE DEVELOPMENT WHERE THE SITE HAD ALREADY BEEN DISTURBED AND THEN ALLOW SOME WHERE THE SITE HADN'T BEEN DISTURBED BE THE OPEN SPACE. OF COURSE, WHERE THAT EXISTING ROAD GOES AROUND THE PERIMETER, THAT WOULD BE RESTORED DISTURBED AREA.

Q. THIS HABITAT AREA HAD BEEN DISTURBED BY PHILIPS PETROLEUM AND THE TANK FARM?

A. THE ACCESS ROAD, YES.

Q. AS WELL AS ITS EXISTING ROAD?

A. YES.

Q. WERE YOU PROPOSING TO TEAR OUT THAT ROAD THAT EXISTS TO THIS DAY?



A. YES, AND TO RESTORE THAT TO NATURAL HABITAT.

Q. WE WILL HAVE DOCTOR BRIGHT HERE, BUT IF YOU COULD, WHEN YOU WERE TALKING ABOUT RESTORATION, WHAT KIND OF THINGS DID YOU HAVE IN MIND?

A. THAT IS BASICALLY CREATING A PLANTED AREA THAT WOULD BE PLANTED WITH THE PLANT, WHICH IS THE BUCKWHEAT, AND THERE ARE TWO TYPES OF BUCKWHEAT, THE FEMALE AND THE MALE. AND I'M NOT EXPERT TO DEFINE WHAT THAT MEANS, BUT THAT IS THE HABITAT WHERE THE SMITH'S BLUE BUTTERFLY HATCHES AND BASICALLY WHERE THEY LIVE.

AND THERE'S THIS HABITAT KIND OF SCATTERED ALONG THE [p. 154] MONTEREY BAY ALL THE WAY FROM THIS SITE A LITTLE FARTHER SOUTH FROM THIS SITE ALL THE WAY UP TO SAND CITY, FORT ORD, MARINA, ALL THE WAY TO THE SALINAS RIVER.

SO THERE IS A LOT OF THIS HABITAT AREA THAT THE SMITH'S BLUE BUTTERFLY HAS. BASICALLY, BY RESTORATION, IT WOULD BE REGRADING AND REPLANTING, AND IN REPLANTING IT HAS TO BE DONE FROM THE SEEDS THEMSELVES.

AS I REMEMBER, AND DOCTOR BRIGHT CAN ELABORATE, BUT CHEVRON DID THIS IN DUNES BY

THE AIRPORT IN LOS ANGELES. IT'S THE SAME CONCEPT OF CREATING NATURAL HABITAT FOR THE SMITH'S BLUE BUTTERFLY.

Q. YOU USED THE EXPRESSION THAT WHERE THE TANKS FARMS WERE, IT WAS DISTURBED.

WHEN YOU SAY THE LAND WAS DISTURBED, WHAT EXACTLY DO YOU MEAN?

A. WELL, SOMETIME IN THE PAST IT PROBABLY HAD BEEN NICE UNDULATING SAND DUNES, AND THIS HAD ALL BE GRADED OUT AND THERE WERE BASICALLY PADS BUILT AND PIPES RUN BETWEEN TANKS AND PIPES RUN ALL OVER THE PLACE BETWEEN TANKS.

THEN WHEN THESE TANKS WERE PULLED OUT, THERE WERE STILL THE OIL STAINED PADS WHERE THEY SAT, CONCRETE CHUNKS IN THE ROAD AND AMONG THESE TANKS. IT WAS ABOUT AS DISTURBED AS YOU CAN DISTURB A NATURAL SAND DUNE AREA.

\* \* \*

[p. 159] Q. HOW LONG DID IT TAKE TO GET TO THE ARCHITECTURAL REVIEW COMMITTEE AND GET A DECISION FROM THEM ON YOUR 190-UNIT PROPOSAL HERE?

A. WELL, BECAUSE OF THE COMPLEXITY OF THE PROJECT, I BELIEVE WE SAT DOWN WITH CITY STAFF AND DECIDED HOW THIS WOULD BE DONE.

ITEM NUMBER B IN NUMBER 1 ALSO HAS THE CONDITION THAT THE PLANNING COMMISSION. IT

SAYS THE PLANNING COMMISSION SHALL EVALUATE AND DETERMINE WHETHER ADDITIONAL PUBLIC PARKING SHOULD BE PROVIDED, ALSO HOW THAT SHOULD BE LOCATED, WHAT THAT RIGHT-OF-WAY SHOULD LIKE [sic] LOOK LIKE IN TERMS OF WIDENING THAT ROAD THAT WE TALKED ABOUT OR HOW THAT PRIVATE ACCESS SHOULD BE.

AND IN C IT SAYS ALSO THAT THE PLANNING COMMISSION NEEDED TO REVIEW HOW WE CUT THAT 15 PERCENT SQUARE FOOTAGE OUT OF THE PROJECT.

IN D, THAT THEY SHOULD EVALUATE THE ALIGNMENT OF U-CORRIDORS IN ORDER TO INCREASE THE VIEW POTENTIAL. IT WAS FELT WE SHOULD HAVE SOME MEETINGS WITH THE PLANNING COMMISSION FIRST BECAUSE THESE WERE ITEMS THAT COULD EFFECT SOME OF THE ARCHITECTURAL CONSIDERATIONS OF THE REVIEW BOARD SO AS NOT TO GET AHEAD ONE FROM THE OTHER.

SO WE HAD - I DON'T REMEMBER, BUT I KNOW WE HAD TWO, THREE FOUR MEETINGS. WE HAD FIELD TRIPS WITH THE [p. 160] PLANNING COMMISSION TO GET THEIR INPUT INTO THAT. AND THEY MADE CERTAIN RECOMMENDATIONS, THE ARCHITECTURAL REVIEW BOARD, ON WHO [sic] HOW TO EVALUATE THOSE ISSUES.

IN ADDITION TO THAT, THE CITY DECIDED THEY SHOULD HIRE AN INDEPENDENT ARCHITECT

IN MONTEREY TO MAKE AN INDEPENDENT CRITIQUE OF THE PROJECT AND HAVE HIS RECOMMENDATIONS TO THE ARCHITECTURAL REVIEW COMMITTEE TO HELP IN EVALUATION OF THIS.

SO THERE WAS ANOTHER ARCHITECT THAT WENT THROUGH AND WROTE A SEVERAL PAGE CRITIQUE OF WHERE HE FELT THIS SETBACK SHOULD BE WIDENED, THIS SHOULD BE SHIFTED. LOTS OF LITTLE DETAIL ITEMS.

SO WHAT WE DID IS WE MASSAGED OUR PLAN TO RESPOND TO ALL OF THOSE GUIDELINES, BOTH WHAT THE PLANNING COMMISSION HAD DECIDED, WHAT THE ARCHITECT HAD RECOMMENDED, AND THEN MET WITH THE ARCHITECTURAL REVIEW COMMITTEE ON SEVERAL MEETINGS GOING OVER DETAIL BY DETAIL.

WE HAVE STACKS OF DRAWINGS THIS THICK OF FLOOR PLANS AND ALL THE EXTERIOR ELEVATIONS OF ALL THOSE BUILDINGS SHOWING BALCONIES AND RAILINGS AND HOW IT WAS GOING TO BE BROKEN UP, HOW THE UNITS WERE GOING TO LOOK.

WE HAD BROUGHT IN A LANDSCAPE ARCHITECT THAT DID A CONCEPTUAL LANDSCAPE PLAN. THEY WANTED CROSS-SECTIONS THROUGH RETAINING WALLS, WALKS, EVERYTHING IN TERMS OF HOW WE WERE GOING TO TREAT THIS AREA. I BELIEVE EVEN HOW THE BOARDWALK [p. 161] WAS GOING TO BE BUILT IN TERMS OF GOING DOWN TO THE BEACH.



Q. OVER THE SAND DUNES?

A. OVER THE SAND DUNE AREA. SO THIS TOOK THE GREATER PART OF A YEAR BETWEEN THE PLANNING COMMISSION HEARINGS AND ARCHITECTURAL REVIEW MEETINGS.

THEY ULTIMATELY MENTIONED PUTTING POLICIES ON THE PROPERTY, HAVING A SURVEY - SURVEY THE ACTUAL EXISTING ELEVATION AT THE TOP OF THE BLUFF SO THAT THEN WE COULD TAKE CALTRANS MAPS AND GET THE GRADES AND PLOT WHAT WOULD BE ANGLES OF VIEW ACROSS THE PROPERTY IF YOU'RE SITTING IN A CAR YOUR EYES FOUR FEET OFF THE PAVEMENT. ALL THOSE CONSIDERATIONS. SO THAT WAS ALL PART OF THE PROCESS.

THEN THE ARCHITECTURAL REVIEW COMMITTEE FINALLY APPROVED THE SCHEMATIC ARCHITECTURAL DESIGN.

\* \* \*

[p. 164] Q. REFERRING TO CONDITION 1-A, THAT WAS THE ARCHITECTURAL REVIEW COMMISSION, DID THAT - I HAVE ASKED YOU ABOUT AND YOU DESCRIBED YESTERDAY FOR THE JURY WHAT YOU WENT THROUGH AND THE LENGTH OF TIME AND THE STACK OF DRAWINGS.

DID YOU ULTIMATELY GET APPROVAL FROM THE ARCHITECTURAL REVIEW COMMITTEE OF THE CITY OF MONTEREY IN TERMS OF THE TYPES OF HOUSES YOU WERE PROPOSING AND THE FLOOR

PLANS AND ALL THOSE OTHER MATTERS THAT YOU DESCRIBED?

A. YES, WE DID.

Q. THEREFORE, HAD YOU SATISFIED THIS CONDITION?

A. YES.

Q. REFERRING TO CONDITION 1-B, THAT'S A REFERENCE TO THE EVALUATION OF WHETHER ADDITIONAL PUBLIC PARKING SHOULD BE PROVIDED.

DO YOU SEE THAT?

A. YES, I DO.

Q. DID YOU FURTHER INVESTIGATE OR ANALYZE THAT IN SATISFACTION OF THAT CONDITION?

A. YES. THAT WAS DETERMINED BY THE PLANNING COMMISSION AT A STUDY SESSION WHAT THEY FELT SHOULD BE PROVIDED IN TERMS OF PUBLIC PARKING, AND THAT WAS INCORPORATED INTO OUR PLANS, AND IT WAS APPROVED.

[p. 165] Q. AGREED UPON?

A. AGREED UPON.

Q. THAT CONDITION SATISFIED?

A. YES.

Q. AGAIN, CONDITIONS 1-C AND 1 - LET'S TALK ABOUT 1-C. YOU REFERRED EARLIER IN YOUR

TESTIMONY THAT THE CITY COUNCIL HAD WANTED A 15-PERCENT REDUCTION FROM 220 TO 190 UNITS. THIS CONDITION SPEAKS TO THE SQUARE FOOTAGE ASPECT OF THAT.

DID YOU FURTHER ANALYZE AND HAVE DISCUSSIONS WITH THE CITY CONCERNING THAT CONDITION?

A. YES, WE DID. AND WE SUBMITTED TO THE CITY A DETAILED BREAKDOWN OF HOW WE WERE REDUCING THE FLOOR AREA BY A 15-PERCENT REDUCTION. AND THIS REQUIRED A CERTAIN ANALYSIS, BECAUSE IN SOME CASES WE WERE GOING FROM BUILDINGS WITH OUTSIDE STAIRS AND BALCONIES TO TOWNHOUSES WITH INTERIOR STAIRS. SO THE COMBINATION OF HOW WE CALCULATED IT.

BUT WE DID GET THAT TO THE CITY, AND THEY AGREED WITH OUR ANALYSIS, AND I DON'T REMEMBER ANY PROBLEM WITH WHAT WE HAD PRESENTED. BASICALLY, IT WAS APPROVED TO SATISFY THAT CONDITION.

Q. CONDITION 1-D TALKS ABOUT ALIGNMENT OF VIEW CORRIDORS AND INCREASING THE VIEW POTENTIAL.

DID YOU, AFTER SEPTEMBER OF '84, DO FURTHER INVESTIGATION AND ANALYSIS AND WORK CONCERNING THAT CONDITION?

A. YES, WE DID, AND THAT WAS, AGAIN, BOTH WITH THE PLANNING [p. 166] COMMISSION AND WITH THE ARCHITECTURAL REVIEW, ANALYZING

THE WIDTH OF THE VIEW CORRIDORS, AND WE DID CROSS-SECTIONS TO SHOW WHAT THOSE CORRIDORS WOULD LOOK LIKE.

Q. YOU HAD DESCRIBED YESTERDAY HOW YOU PUT THE POLES UP WITH THE FLAGS AND TOOK VARIOUS MEASUREMENTS.

WAS THAT TO SATISFY THIS CONDITION?

A. THIS CONDITION WAS MORE VIEW CORRIDORS WITHIN THE SITE SO THAT YOU COULD BE ON THE UPPER PART OF THE SITE AND LOOK DOWN THROUGH SPACES BETWEEN BUILDINGS AND SEE THE WATER BASICALLY. AND ALSO THE VIEW CORRIDOR COMING DOWN THE MAIN ENTRANCE ROAD AND ITS ADEQUACY TO PROVIDE A VIEW CORRIDOR OR VIEW PERSPECTIVE OF THE OCEAN.

Q. AND TO PURSUE THIS CONDITION, DID THAT REQUIRE VARIOUS ARCHITECTURAL RENDERINGS AND DISCUSSION SESSIONS AND MEETINGS WITH CITY OFFICIALS?

A. YES.

Q. HOW MANY, IF YOU RECALL?

A. I DON'T REMEMBER THE PARTICULAR NUMBER, BUT I WOULD SAY THERE WERE A COUPLE, AT LEAST, WITH THE PLANNING COMMISSION AND A COUPLE WITH THE ARCHITECTURAL REVIEW COMMITTEE. THERE MAY HAVE BEEN MORE.

I REMEMBER DOING SOME DETAIL PLANS JUST OF THE CORRIDORS THEMSELVES AND THE SPACE



BETWEEN THE BUILDINGS AND ANALYZING THAT. AND THEN THEY WOULD MAKE SOME COMMENTS AND WE WOULD GO BACK AND MAKE CHANGES AND THEN COME BACK. SO THERE [p. 167] WERE MEETINGS WHERE WE WERE WORKING WITH THEIRS [sic] CONCERNS.

Q. CONDITION 2 REFERS TO SUBMITTAL OF SUFFICIENT DETAILED PLANS FOR CONCEPT REVIEW AND APPROVAL BY THE ARCHITECTURAL REVIEW COMMITTEE.

AS PART OF WHAT YOU WERE DESCRIBING, DID YOU SATISFY THIS CONDITION BY SUBMITTING THOSE SUFFICIENT DETAILS FOR THE ARCHITECTURAL REVIEW COMMITTEE?

A. YES, WE DID. AND WE GOT APPROVAL FROM THE ARCHITECTURAL REVIEW COMMITTEE.

Q. CONDITION 3, THAT IS ENTITLED "SMITH'S BLUE BUTTERFLY." LET ME, IF I MIGHT, COME BACK TO THAT.

LET ME ASK YOU ABOUT CONDITION 4. THAT'S REFERENCED TO "RARE AND ENDANGERED PLANTS" AND REFERS TO THAT:

"THESE PLANTS SHALL BE PROTECTED IN LINE WITH PROTECTION POLICIES OF THE DEL MONTE DUNE LAND USE PLAN AND SHALL BE REVIEWED BY THE NATIVE PLANT SOCIETY."

CAN YOU EXPLAIN TO THE JURY WHAT YOU UNDERTOOK TO SATISFY CONDITION NUMBER 4?

A. THAT WAS SATISFIED BY WORKING WITH MR. BRIGHT, WHO WAS THE CONSULTANT WHO BASICALLY PREPARED THE RESTORATION PLAN AND INCORPORATING HIS RECOMMENDATION IN OUR PLAN IN TERMS OF WIDTH OF RESTORATION AREA WHERE WE LOCATED OUR DEVELOPMENT, AND THAT WAS ALL SUBMITTED FOR REVIEW AND WAS PART OF THE OVERALL REVIEW PROCESS.

[p. 168] Q. WAS THAT SATISFACTORY TO THE CITY IN TERMS OF PROTECTION OF THESE RARE AND ENDANGERED PLANTS?

A. YES.

Q. LET ME ASK SOMETHING ELSE BEFORE I GO ON TO SOME OF THESE OTHER ONES; ONCE GOT [sic] THIS APPROVAL IN SEPTEMBER OF 1984, HOW LONG DID IT TAKE YOU AND THE OTHER TEAM MEMBERS REPRESENTING THE OWNER OR APPLICANT TO DO ALL THIS WORK WITH THE ARCHITECTURAL REVIEW COMMITTEE AND THESE NATIVE PLANTS AND THE LIKE?

A. IT TOOK OVER A YEAR. IT TOOK ABOUT 15 - 14, 15 MONTHS, BECAUSE BASICALLY IT TOOK TO THE END OF '84 AND ALL OF '85, AND IT WASN'T UNTIL EARLY '86 THAT WE WERE READY TO GO BACK TO THE PLANNING COMMISSION.

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[p. 181] Q. I KNOW DOCTOR BRIGHT WILL BE TESTIFYING. I DON'T WANT TO GO INTO THE NATURE OF THOSE DIFFERENT PLANS. I WOULD LIKE TO ASK GENERALLY, BEFORE THE SEPTEMBER

1984 APPROVAL OF THE 190 UNITS IN THE BOWL HERE, WAS THE CITY AWARE THAT THERE WAS THIS HABITAT OUT THERE AND THE POTENTIAL OF THESE BUTTERFLIES OUT THERE?

A. YES, THE CITY WAS AWARE AS WELL. IN FACT, THE EIR WAS DONE. I DON'T REMEMBER TO WHAT DETAIL THE EIR IN '82 OR '81 LOOKED INTO THE - LOOKED INTO THE SMITH'S BLUE BUTTERFLY AND ITS ENVIRONMENTAL IMPACT POTENTIAL, BUT THERE WAS LATER AN EIR SUPPLEMENTAL DONE BY THE SAME CONSULTANT THAT SPECIFICALLY LOOKED AT THE BUTTERFLY HABITAT AND BASICALLY CAME TO THE CONCLUSION THAT THERE WAS NO SIGNIFICANT IMPACT OF WHAT WE WERE PROPOSING. AND THIS WAS FOR THE 344 PLAN ON THE HABITAT OF THE SMITH'S BLUE BUTTERFLY.

Q. THERE'S REFERENCE IN THIS CONDITION TO HABITAT PRESERVATION.

WOULD THAT BE ANOTHER WAY OF SAYING RESTORATION [p. 182] PLAN?

A. YES.

Q. THAT'S WHAT WAS GOING TO BE REVIEWED BY THESE OTHER AGENCIES?

A. CORRECT.

Q. LET ME ASK YOU, GOING BACK TO THE 190 UNITS AND THE LOCATION IN WHICH THE CITY APPROVED IT IN SEPTEMBER OF 1984, BEFORE THIS SEPTEMBER '84 APPROVAL, HAD DOCTOR BRIGHT

OR OTHERS - AND OTHERS, ANALYZED WHERE THE BUTTERFLY HABITAT WAS ON THE PROPERTY?

A. YES.

Q. SO WHEN YOU WERE DESIGNING THIS SUBDIVISION, YOU KNEW ROUGHLY WHERE THAT HABITAT WAS, CORRECT?

A. CORRECT.

Q. AND BY HABITAT -

CAN YOU TELL ME WHAT YOU UNDERSTAND OR WHAT YOU UNDERSTOOD BY BUTTERFLY HABITAT? WHAT IS IT?

A. BASICALLY, THE LOCATION OF SOME OF THESE PLANTS, THE BUCKWHEAT PLANT AND THE TWO SPECIES, THE MALE AND THE FEMALE SPECIES, AND I DON'T REMEMBER THE SCIENTIFIC NAME, BUT - THAT ARE LOCATED ON THE SITE. NOT IN ANY GREAT NUMBER. NOT IN ANY GREAT CONCENTRATION. KIND OF SPRINKLED AROUND THESE OIL SOAKED PADS, BUT THEY WERE THERE AND EVERYBODY WAS AWARE THEY WERE THERE.

Q. THE PLANTS?

[p. 183] A. THE PLANTS, YEAH. UP UNTIL THAT TIME, THERE WAS NO - THERE WASN'T A BUTTERFLY LOCATED, BUT THE PLANTS WERE THERE.

AS I MENTIONED, THE PLANTS, IN MY UNDERSTANDING, ARE NOT ENDANGERED THEMSELVES AND ARE IN FACT UP AND DOWN THE COAST OF CALIFORNIA. SO THERE'S NOTHING UNIQUE ABOUT THE PLANT ITSELF.



Q. LET'S TALK ABOUT THE LOCATION OF THE PLANT. BEFORE YOU DESIGNED THE 190-UNIT PROPOSAL HERE AFTER THESE SEVERAL YEARS, YOU DESCRIBED YESTERDAY OF INPUT FROM VARIOUS AGENCIES.

DID YOU HAVE FROM DOCTOR BRIGHT AND OTHERS THE LOCATION OF WHERE THESE BUCKWHEAT PLANTS WERE? CAN YOU JUST DESCRIBE FOR THE JURY GENERALLY WHERE THOSE PLANTS WERE LOCATED?

A. GENERALLY, IN THE EASTERN CORNER OF THE PROPERTY AND GOING INTO THE AREA WHERE THE BUILDINGS ARE SHOWN, A LITTLE BIT ON THE EASTERN CORNER OF THE PROPERTY.

Q. WHERE I'M INDICATING WITH MY FINGER HERE (INDICATING)?

A. YES. A LITTLE BIT UP INTO THAT AREA AS WELL. BUT TO MY UNDERSTANDING, IT WAS - THE GREATEST POTENTIAL LOCATION OF THE HABITAT FOR THE BUTTERFLY WAS ON THE BACK DUNE WHERE IT COULD BE PROTECTED FROM THE WIND BECAUSE OF BEING ON THE BACK SIDE OF THE DUNE; THAT THERE WAS LESS LIKELY TO BE BUTTERFLIES SPOTTED DOWN IN THE BOWL OR WHERE THESE OTHER PLANTS WERE BECAUSE THAT'S WHERE THE HARSHER WEATHER WAS LOCATED. AND THE MOST VALUABLE RESTORATION PLAN WAS ON THE BACK SIDE OF THE [p. 184] DUNE WHERE WE BASICALLY ENDED UP DOING OUR RESTORATION PLAN.

Q. IN YOUR PLAN, DID YOU MAKE SURE THAT HOUSING UNITS WERE KEPT OUT OF THAT BACK DUNE AREA?

A. YES.

Q. DID YOU, WHEN YOU DESIGNED THIS 190-UNIT PROPOSAL AFTER SEVERAL YEARS OF THESE MEETINGS WITH THE CITY AND OTHER AGENCIES, DID YOU KNOW THERE WERE SOME BUCKWHEAT PLANTS IN THE AREA YOU PREPARED FOR HOMES?

A. YES.

Q. DID THE CITY KNOW THAT?

A. TO MY - AS I REMEMBER, THERE WAS NO - EVERYBODY KNEW WE HAD IT. WE HAD HAD FIELD TRIPS OUT ON THE SITE.

Q. SO AT THE TIME OF THE APPROVAL IN 1990 - LET ME STRIKE THAT AND ASK IT A DIFFERENT WAY.

YOU WERE SAYING YOU HAD HAD A LOT OF MEETINGS BEFORE THE SEPTEMBER '84 APPROVAL WITH VARIOUS CITY OFFICIALS, AND DOCTOR BRIGHT WAS WORKING ON SOME THINGS.

DID DOCTOR BRIGHT, IN TERMS OF THIS STUDY HE PREPARED BEFORE THIS APPROVAL, DID HE TRANSMIT THOSE TO THE CITY?

A. YES.

Q. AND THEY SHOWED WHERE THE - THE FACT THERE WAS SOME BUCKWHEAT WHERE YOU HAD PROPOSED HOUSES?

A. YES.

Q. AT THE TIME OF THE APPROVAL, DID THE CITY KNOW THAT SOME [p. 185] OF THESE HOUSES WERE GOING TO BE BUILT WHERE THE BUCKWHEAT WAS?

A. YES.

Q. YOU MENTIONED EARLIER -

CAN YOU DESCRIBE FOR THE JURY THIS AREA WHERE THESE BUCKWHEAT PLANTS ARE FOUND? WHERE WAS THE RELATIONSHIP OF THE BUCKWHEAT PLANTS TO THE SITE?

A. MAY I COME DOWN?

Q. CERTAINLY.

A. AS WE MENTIONED YESTERDAY, THIS IS BASICALLY THE BOWL. AND THESE PADS OCCUR IN DIFFERENT CONFIGURATIONS. THERE WERE TWO OR THREE ROWS OF KINDS OF THESE PADS.

WELL, IN BETWEEN SOME OF THESE PADS THERE WOULD BE LITTLE CLUSTERS OF A FEW PLANTS. NOT A LARGE CLUSTER, BECAUSE IT WASN'T A LARGE AREA. BUT THEY WOULD BE THERE AMONG THE PIPE AND CHUNKS OF CONCRETE AND EVERYTHING THAT SOME OF THESE PLANTS WOULD BE GROWING.

IN SOME PLACES THERE WAS ICE PLANT THERE. IN SOME PLACES THEY WERE TAKING OVER. SO IT WAS IN BETWEEN THESE OIL SOAKED PADS THERE WERE LITTLE SPOTS OF BUCKWHEAT PLANT LOCATED.

Q. SO TO THE EXTENT THAT THERE'S REFERENCE TO HABITAT IN YOUR BUILDING AREA, THE REFERENCE IS TO THESE PLANTS HERE AND THERE?

A. YES.

[p. 186] Q. HOW BIG ARE THESE BUCKWHEAT PLANTS?

A. MY MEMORY IS THEY ARE NOT MORE THAN 12, 18 INCHES MAYBE IN DIAMETER, AND HEIGHT MAYBE 24.

DON BRIGHT CAN CERTAINLY ANSWER THAT BETTER THAN I CAN. THEY ARE NOT MUCH BIGGER THAN THAT. THEY ARE A SMALL, SCRAGGLY LOOKING PLANT - TO ME.

Q. LET ME FOCUS NOW ON THE WORDS IN CONDITION 3 THAT THE CITY REQUIRED YOU TO PROTECT THE EXISTING HABITAT.

DO YOU SEE THAT?

A. YES.

Q. HAD YOU HAD DISCUSSIONS WITH THE CITY CONCERNING THE PHRASING OF THAT CONDITION PREVIOUS TO THE APPROVAL? YES. THAT REALLY GOES BACK TO THE HISTORY OF THE LOCAL COASTAL PLAN. WHEN WE WERE WORKING WITH THE CITY IN '82-'83 ON THE LOCAL COASTAL PLAN, PART OF THE LOCAL COASTAL PLAN WAS CITY POLICIES ON PROTECTING HABITAT.

IT WAS UNDERSTOOD AT THAT TIME THAT THE WORD "PROTECT" DID NOT MEAN PROTECT EVERY



SINGLE PLANT THAT EXISTED ON A PIECE OF PROPERTY, BUT PROTECT THE FACT THAT THE HABITAT IS THERE AND THAT COULD BE DONE BY KEEPING SOME OF THE EXISTING PLANTS AS WELL AS DOING A RESTORATION PLAN AND ALLOWING FOR AN INCREASED AREA IN A LOCATION THAT COULD BE BETTER IN TERMS OF A HABITAT, IN TERMS OF ITS REAL VALUE RATHER THAN KIND OF SPREAD OUT PIECEMEAL OVER THE PROPERTY.

Q. DID YOU DISCUSS WITH CITY OFFICIALS THIS CONCERN OF YOURS [p. 187] THAT THE NOTION OF PRESERVING AN EXISTING HABITAT NOT BE MISINTERPRETED TO MEAN YOU COULDN'T BUILD OVER A PARTICULAR PIECE OF BUCKWHEAT?

A. YES.

Q. LET ME SHOW YOU EXHIBIT 71.

DO YOU RECOGNIZE EXHIBIT 71, MR. DAVIS?

A. YES.

Q. DID THE CITY PROVIDE YOU WITH A COPY OF THAT IN SEPTEMBER 1984?

A. YES.

Q. THIS IS A DOCUMENT FROM THE SENIOR PLANNER, MR. NORTON.

DO YOU KNOW WHO HE WAS?

A. YES.

Q. WHO WAS HE?

A. HE WAS THE SENIOR PLANNER THAT AT THAT TIME WAS HANDLING THE LOCAL COASTAL

PLAN PROCESS. HE WAS BASICALLY DOING THE WRITING OF IT, HANDLING ALL OF THE APPROVAL PROCESS WITH THE COASTAL COMMISSION, AND HE WAS THE MAIN PLANNER IN TERMS OF THE LOCAL COASTAL PLAN. SO WE WERE WORKING TOGETHER ON THESE POLICIES.

Q. HE'S DIRECTING THIS TO THE COMMUNITY DEVELOPMENT DIRECTOR.

IS THAT THE HEAD OF THE PLANNING DEPARTMENT?

A. YES.

WHO WAS THAT INDIVIDUAL AT THE TIME, IF YOU RECALL?

A. MR. BILL WOJTKOWSKI.

[p. 188] Q. THIS SEPTEMBER '84 MEMORANDUM IS RIGHT BEFORE THE APPROVAL OF YOUR 190-UNIT PLAN, ISN'T IT?

A. YES.

Q. HERE MR. NORTON, ON BEHALF OF THE CITY, CONCLUDES THAT YOUR SCHEME D, EXHIBIT 83-A, ADHERES TO ALL POLICIES IN THE DEL MONTE BEACH LUP WITH ONE EXCEPTION. WHAT IS THE LUP?

A. THAT IS THE LAND USE PLAN. THE LAND USE PLAN IS PART OF THE LOCAL COASTAL PLAN IN THAT IT'S A BASIC LAND USE PLAN WHICH SHOWS WHERE DIFFERENT USES CAN BE LOCATED AND POLICIES ON HOW THOSE USES SHALL BE DEVELOPED WITHIN THE COASTAL PLAN.

Q. DID MR. NORTON ADVISE YOU JUST BEFORE THIS SEPTEMBER '84 APPROVAL THAT IN FACT YOUR 190-UNIT SCHEME COMPLIED OR ADHERED TO ALL THE POLICIES IN THE LAND USE PLAN FOR THE MONTEREY - CITY OF MONTEREY?

A. YES. AND WHAT HE POINTS OUT HERE AT ONE TIME WE DID SHOW SOME PRIVATE YARDS FROM SOME OF THOSE UNITS THAT ARE ON THE - THAT ARE CLOSEST TO THE OCEAN INFRINGING OVER THAT SEWER EASEMENT.

YOU SEE THAT DOUBLE LINE. THAT IS THE SEWER EASEMENT. WE HAD ALL THE BUILDINGS BACK, BUT WE HAD SOME YARDS THAT KIND OF WENT OUT OVER THAT. AND THE INTERPRETATION OF STAFF WAS THAT EVEN THE PRIVATE YARDS NEEDED TO BE BACK OF THAT LINE.

SO WE MADE THOSE ADJUSTMENTS, THEN, AS PART OF OUR ONGOING ADJUSTING THE PLAN AFTER THAT. BUT THIS IS WHAT HE IS [p. 189] REFERRING TO, THAT EVEN THE PRIVATE YARDS SHOULD BE IN BACK OF THAT LINE.

Q. WITH THE ONE EXCEPTION OF THESE YARDS ENCROACHING, THE PLANNING DEPARTMENT OF THE CITY OF MONTEREY TOLD YOU YOU ADHERED TO EVERYTHING ELSE IN THIS LUP?

A. YES.

\* \* \*

[p. 211] Q. HAD ANYONE FROM THE CITY ADVISED YOU AT ANY TIME AT ANY OF YOUR PREVIOUS PROPOSALS, INCLUDING THE 190 LOT SITE PLAN APPROVED IN SEPTEMBER '84, WOULD SUBSTANTIALLY INJURE THE HABITAT OF THE SMITH'S BLUE BUTTERFLY?

A. NO.

Q. WAS THAT DOCTOR BRIGHT'S CONCLUSION THAT IT WOULD SUBSTANTIALLY DAMAGE THE HABITAT OF THE SMITH'S BLUE BUTTERFLY?

A. NO.

Q. NUMBER 5 SAYS "THE PROJECT AS SUBMITTED IS NOT IN CONFORMANCE WITH THE GENERAL PLAN."

IS IT THE MONTEREY GENERAL PLAN THEY ARE TALKING ABOUT?

A. I ASSUME SO, YES.

Q. I ASKED YOU AT THE BEGINNING OF YOUR TESTIMONY YESTERDAY IN YOUR QUALIFICATIONS IF YOU KNEW THE MONTEREY GENERAL PLAN, ZONING AND THE LIKE.

ARE YOU FAMILIAR, IN 25 YEARS OF PRACTICING DOWN THERE, ABOUT THE CONDITIONS, POLICIES, RULES, REGULATIONS IN THE MONTEREY GENERAL PLAN?

A. YES, IN GENERAL, AND I'M VERY AWARE OF THE GENERAL PLAN AND HAVE ACCESS - HAVE A COPY OF THE GENERAL PLAN. SO I REFER TO IT IN



ITS VARIOUS POLICIES, AS WE DID AT THE START OF [p. 212] THIS PROJECT BACK IN '81.

THAT WAS PART OF OUR JOB WAS TO MAKE SURE THAT WE WERE DOING A PROJECT FOR PONDEROSA HOMES AT THAT TIME WITHIN THE GENERAL PLAN, WITHIN THE ZONING LAWS OF THE CITY OF MONTEREY. AND IN FACT, IN '82 THE ENVIRONMENTAL IMPACT REPORT - PART OF ITS JOB IS TO ANALYZE THE GENERAL PLAN AND LIST THE POLICIES OF THE GENERAL PLAN THAT APPLY TO A PARTICULAR DEVELOPMENT AND THEN ANALYZE WHETHER THIS DEVELOPMENT HAS AN IMPACT ON THOSE POLICIES OR NOT. AND THAT WAS DONE CONTINUOUSLY THROUGH THE ENVIRONMENTAL IMPACT REPORT AND ONGOING AS WE WENT THROUGH THIS PROJECT.

Q. LET ME FOLLOW UP ON THAT. THIS JURY HAS HEARD EVIDENCE NOW WHERE YOU WENT FROM 344 TO 264 TO 224 TO 190.

EVERY TIME THAT THE COUNCIL DIRECTED YOU TO GO BACK AND CHANGE IT, WOULD YOU THEN BE COMING BACK TO THE PLANNING STAFF TO OBTAIN DETERMINATIONS AS TO CONSISTENCY WITH THE MONTEREY GENERAL PLAN, OR CONFORMITY, I SHOULD SAY?

A. I THINK IT WAS GENERALLY ASSUMED BECAUSE WE WERE MAKING THE PROJECT SMALLER THAT IT WAS NOT GOING TO PRODUCE ANY GREATER IMPACT. THE SMALLER PROJECT WOULDN'T CREATE ANY GREATER IMPACT THAN THE LARGER PROJECT.

BUT AT THE LATER STAGES, I BELIEVE, WHEN WE CAME IN WITH THE 190-UNIT PLAN, THERE WAS ANOTHER ENVIRONMENTAL IMPACT EVALUATION MADE BY STAFF. IN FACT, THERE WAS, UP UNTIL EITHER LATE '85 OR CERTAINLY '86, AN EVALUATION DONE THAT AGAIN WENT [P. 213] BACK AND COMPARED THE PROJECT WITH THE ENVIRONMENTAL IMPACT REPORT FOR THE 244. IT CAME TO THE SAME CONCLUSION: THERE ARE NO SIGNIFICANT IMPACTS.

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[p. 215] Q. YOU SAID THERE WAS DISCUSSION, AND THE EFFECT OF THIS WAS TO FORCE YOU INTO OPEN SPACE.

ARE YOU AWARE, HAVING BEEN IN THE MONTEREY AREA AS A PRACTICING PROFESSIONAL PLANNER AND ARCHITECT FOR THE LAST 25 YEARS OR SO, ARE YOU AWARE OF, EITHER JUST DURING THIS TIME PERIOD '81 OR '85 OR SHORTLY BEFORE IT, OF ANY OFFICIAL ADOPTED POLICY BY THE CITY OF MONTEREY CONCERNING OPEN SPACE ON THE SUBJECT PROPERTY, THIS PHILIPS PROPERTY HERE?

A. AS I REMEMBER IN THE 70S, LATE 70S -

MR. YUHAS: I DON'T MEAN TO INTERRUPT THE WITNESS, BUT THIS IS TOUCHING ON AN AREA THE COURT HAS RULED ON.

THE COURT: I DID ON DOCUMENTS, BUT I'M NOT GOING TO PRECLUDE THE WITNESS'S TESTIMONY. THE OBJECTION IS OVERRULED. THE WITNESS MAY TESTIFY.

THE WITNESS: IN THE 1970S THE CITY DID DEVELOP A REDEVELOPMENT PLAN FOR THE BEACHFRONT PROPERTY FROM THE WHARF OUT TO WHAT WAS THEN THE HOLIDAY INN WITH THE INTENT AND THE POLICY TO PRESERVE ALL THE OCEANFRONT PROPERTY THAT HAD NOT BEEN DEVELOPED.

Q. PRESERVE IT IN OPEN SPACE?

A. YES, PRESERVE IT IN OPEN SPACE. AND THERE WAS ALSO THEN EFFORTS TO OBTAIN MONEY TO BE ABLE TO BUY THIS LAND IN OPEN [p. 216] SPACE. AND, IN FACT, THE STATE DID PURCHASE THE PROPERTY ADJACENT TO THIS WHICH WE HAVE IDENTIFIED AS STATE PARKS PROPERTY. THAT WAS PURCHASED IN THE LATE 70S, EARLY 80S, AND THERE WAS DISAPPOINTMENT AT THAT POINT THAT THE STATE HAD NOT PURCHASED ALL THE PROPERTY, INCLUDING PHILIPS PETROLEUM, AND HAD BASICALLY SELECTED THE ONE PARCEL AND NOT THE WHOLE PARCEL TOGETHER.

SO THERE WAS ALWAYS THIS EARLY INTENT THAT THIS SHOULD BE OPEN SPACE AND THE ATTEMPTS BY THE CITY TO OBTAIN MONEY TO BUY THIS AS OPEN SPACE.

Q. LET ME ASK THIS BECAUSE I ASKED YOU ABOUT OFFICIALLY ADOPTED POLICIES OF THE CITY. WHEN YOU REFER TO THIS REDEVELOPMENT AGENCY, WAS THAT A CITY REDEVELOPMENT AGENCY OR THE STATE OF CALIFORNIA REDEVELOPMENT AGENCY?

A. THAT WAS THE CITY'S.

Q. WAS THAT REDEVELOPMENT AGENCY OFFICIALLY ADOPTED BY THE CITY?

A. YES.

Q. AFTER PUBLIC HEARINGS AND THE LIKE?

A. YES.

Q. YOU MENTIONED THAT AS PART OF THIS REDEVELOPMENT AGENCY THERE WAS A POLICY TO ACQUIRE THE PHILIPS PROPERTY.

UNDER THE REDEVELOPMENT AGENCY OFFICIALLY ADOPTED BY MONTEREY, WHO IS GOING TO ACQUIRE THAT PROPERTY?

A. WELL, IT WOULD HAVE TO BE MONTEREY OR SOME ENTITY THAT [p. 217] THEY WOULD BRING IN, LIKE STATE PARKS OR COASTAL CONSERVANCY, OR SOME AGENCY. BUT THE CITY WOULD HAVE TO TAKE THE LEAD IN IT.

\* \* \*

[p. 232] DAVIS-CROSS/YUHAS

Q. THE JOB OF THE COASTAL COMMISSION IS TO ENFORCE THE POLICIES OF THE COASTAL ACT?

A. YES.

Q. AND THERE ARE A NUMBER OF THOSE POLICIES THAT WERE RELEVANT TO THIS PARTICULAR PROPERTY, CORRECT?

A. YES.



[p. 233] Q. NOW, ONE OF THOSE POLICIES DEALS WITH SHORELINE ACCESS, DOES IT NOT?

A. THAT'S CORRECT.

Q. IN A NUTSHELL, IT MEANS THAT WHEN YOU HAVE NEW DEVELOPMENT, YOU HAVE TO PROVIDE PUBLIC ACCESS FROM THE ROADWAY TO THE SHORELINE?

A. THAT'S CORRECT.

Q. THIS IS THE TYPE OF PUBLIC ACCESS YOU WERE TALKING ABOUT YESTERDAY FROM TIME TO TIME WHEN YOU WERE TALKING ABOUT DESIGNING THE PUBLIC ACCESSWAYS AND THE INTERNAL ROADWAYS, CORRECT?

A. YES.

Q. AND THAT'S A STATE-IMPOSED REQUIREMENT?

A. THAT'S CORRECT.

Q. AND THE PROPERTY THAT YOU WERE INCLUDING IN THE ONE-THIRD OF THIS 37 ACRE PARCEL DEVOTED TO PUBLIC USE INCLUDED THE PORTION THAT YOUR CLIENT WOULD HAVE HAD TO DEDICATE FOR THIS STATE-IMPOSED REQUIREMENT, CORRECT?

A. YES. IT WAS PART OF IT.

Q. AND ANOTHER OF THE POLICIES OF THE COASTAL ACT IS THE PROTECTION OF ENVIRONMENTALLY SENSITIVE HABITAT?

A. YES.

Q. AND, AGAIN, THIS IS A STATE-IMPOSED REQUIREMENT?

A. YES.

Q. THIS REQUIREMENT INCLUDES, AMONG OTHER THINGS, THAT [p. 234] ENVIRONMENTALLY SENSITIVE HABITAT BE PROTECTED EITHER THROUGH RESTORATION OR PRESERVATION?

A. THAT'S CORRECT.

Q. AND OFTEN REQUIRES SOME FORM OF DEDICATION OF THE AREA WHICH IS PRESERVED OR RESTORED?

A. YES.

Q. AGAIN, THE AREAS THAT YOUR CLIENT WAS PREPARED TO PRESERVE OR RESTORE, THAT WAS PURSUANT TO A STATE-MANDATED REQUIREMENT?

A. YES.

Q. AND THAT WAS INCLUDED IN THE ONE-THIRD OR SO OF THIS PROPERTY THAT YOU INDICATED WAS BEING PROVIDED FOR PUBLIC USE?

A. YES.

Q. ANOTHER OF THE COASTAL ACTS DEALS WITH LOCATING NEW DEVELOPMENT, CORRECT?

A. YES.

Q. AND AMONG OTHER THINGS, THAT POLICY REQUIRES THAT PUBLIC ACCESS MUST BE MAINTAINED AND ENHANCED BY PROVIDING PARKING?

A. YES.

Q. AND YOU AT VARIOUS TIMES YESTERDAY REFERRED TO THE PARKING THAT WAS BEING PROVIDED, NOT FOR RESIDENTS OF THIS DEVELOPMENT, BUT TO PEOPLE THAT WOULD COME TO THE BEACH?

A. YES.

Q. AGAIN, THAT WAS A STATE-IMPOSED REQUIREMENT?

A. YES.

Q. AND THE PROPERTY AND THE COSTS INVOLVED - THE PROPERTY [p. 235] THAT WAS GOING TO BE REQUIRED FOR THIS WAS INCLUDED IN THAT ONE-THIRD OR SO THAT YOU TALKED ABOUT AS BEING DEVOTED TO PUBLIC USE?

A. YES.

Q. YOU TALKED A LITTLE BIT YESTERDAY ABOUT SOME OF THE - PUTTING UP THE POLES AND PROTECTING VISUAL ACCESS AND THE LIKE.

AGAIN, THAT WAS SOMETHING REQUIRED BY THE COASTAL ACT?

A. THE COASTAL ACT JUST STATES THAT DEVELOPMENT WILL BE SENSITIVE TO THE SURROUNDING AREA. IT WAS REALLY THE CITY THAT DEVELOPED THE POLICY ON WHAT THAT WOULD

MEAN FOR THIS PARTICULAR SITE. AND THAT WAS POLICY THAT WAS BASICALLY IN THE LOCAL COASTAL PLAN OR LAND USE PLAN THAT DEVELOPMENT BE SITED IN THE BOWL SO THAT IT NOT BE VISIBLE.

SO IT WAS REALLY A POLICY OF THE CITY ON HOW THAT WAS CARRIED OUT TO MEET THE MORE GENERAL REQUIREMENT OF THE COASTAL ACT THAT JUST SAYS DEVELOPMENT WILL BE SENSITIVE TO THE AREA.

Q. FAIR ENOUGH. THERE IS A COASTAL ACT POLICY DEALING WITH COASTAL VISUAL RESOURCES?

A. YES.

Q. AND IT'S LEFT IN CONSULTATION WITH STAFF OF THE COASTAL COMMISSION TO THE CITY TO KIND OF DEVELOP A PLAN THAT THEY THINK DOES THAT?

[p. 236] A. THAT'S CORRECT.

Q. THEN THE COASTAL COMMISSION STAFF, OF COURSE, REVIEWS THAT IN THE CONTEXT OF THE LAND USE PLAN?

A. YES.

Q. THERE IS ALSO, IS THERE NOT, A POLICY OF THE COASTAL ACT DEALING WITH HAZARDS?

A. YES.

Q. SOUNDS KIND OF OMINOUS. AMONG OTHER THINGS IT SAYS: DON'T PUT PROPERTY TOO



CLOSE TO THE SHORE BECAUSE IT MIGHT FALL INTO THE OCEAN?

A. YES.

Q. PART OF THE COASTAL ACT REQUIRES THERE BE CERTAIN SETBACKS?

A. YES. NOT SPECIFIC, BUT TO BE DETERMINED BY THE PARTICULAR HAZARD OR THE SITUATION.

Q. THE COASTAL COMMISSION AND ITS STAFF BASICALLY, ON A PROPERTY-BY-PROPERTY BASIS, DECIDES WHAT IS AN APPROPRIATE SETBACK?

A. AFTER THE APPLICANT DOES STUDIES AND PRESENTS DATA AND RECOMMENDATIONS, THAT'S RIGHT. THEY APPROVE OR DECIDE WHAT SHOULD BE THE ADEQUATE SETBACK.

Q. SO ALL OR PART OF THE SETBACK INVOLVED IN YOUR PROPOSED DEVELOPMENT WAS TO ACCOMMODATE A STATE-IMPOSED SETBACK REQUIREMENT, CORRECT?

A. YES, PART OF IT WAS. WE WENT FAR BEYOND THAT. PART OF IT [p. 237] WAS TO MEET THAT REQUIREMENT.

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[p. 248] Q. MAYBE MY QUESTION WASN'T CLEAR. IN THE UNIVERSE OF POSSIBILITIES THERE COULD HAVE BEEN ACCESS THROUGH THE STATE PARKS PROPERTY?

A. YES.

Q. COULD HAVE BEEN ACCESS THROUGH TIDE?

A. YES.

[p. 249] Q. OR POSSIBLY SOME OTHER ROAD IN THAT SUBDIVISION, BUT I'LL LUMP THEM TOGETHER, OKAY?

A. YES.

Q. ACCESS THROUGH DEL MONTE AVENUE?

A. YES.

Q. AND ACCESS THROUGH THE UNBUILT FRONT STREET?

A. YES.

Q. FRONT STREET WAS NEVER SERIOUSLY CONSIDERED, CORRECT?

A. CORRECT.

Q. STATE PARKS SAID YOU CAN'T HAVE ACCESS THROUGH OUR PROPERTY, AT LEAST UNTIL THE PLANNING PROCESS IS DONE?

A. THAT'S CORRECT.

Q. CITY COULDN'T DO ANYTHING ABOUT THAT, CORRECT?

A. CORRECT.

Q. DEVELOPER COULDN'T DO ANYTHING ABOUT THAT?

A. CORRECT.

Q. AT LEAST UNLESS IT WAS WILLING TO FUND THE PLANNING PROCESS?

A. THAT'S RIGHT.

Q. SO THERE WERE TWO POSSIBLE ACCESS ROUTES AVAILABLE?

A. YES.

Q. SO THE TESTIMONY ABOUT WHO CHOSE THE ACCESS ROUTES, THERE REALLY WASN'T MUCH CHOOSING TO BE DONE, WAS THERE?

A. IT NARROWED IT DOWN, BUT AT THAT TIME IS WHEN THE CITY MADE IT THAT THEY WOULD RATHER NOT HAVE THE ACCESS WHERE THE [p. 250] CURRENT ACCESS TO THE PROPERTY BUT RATHER HAVE IT SHIFTED TO THE EAST. THAT IS WHAT I WAS REFERRING TO.

Q. I APOLOGIZE. SO WHEN YOU SAY IT WAS THE CITY'S CHOICE OF ACCESS, YOU WERE SAYING IT WAS THE CITY'S CHOICE AS TO WHERE THE CONNECTION WOULD BE ON DEL MONTE?

A. THAT'S CORRECT.

Q. BECAUSE THERE WEREN'T ANY OTHER CHOICES TO TIE INTO DEL MONTE?

A. THAT'S CORRECT.

Q. LET'S TALK ABOUT HABITAT. ONE OF THE THINGS THAT WAS DONE EARLY ON IN THE PROJECT WAS, OF COURSE, TO STUDY THE HABITAT, CORRECT?

A. CORRECT.

Q. AND YOU TALKED ABOUT THE ENVIRONMENTAL IMPACT REPORT AND THE SUPPLEMENTAL REPORT.

THOSE REPORTS CONFIRM THAT THERE WAS ENVIRONMENTALLY SENSITIVE HABITAT?

A. YES.

Q. AND THE DUNE PORTION OF THE PROPERTY WAS CONSIDERED TO BE ENVIRONMENTALLY SENSITIVE HABITAT BY THE COASTAL COMMISSION?

A. YES.

Q. WE TALKED EARLIER THAT ONE OF THE POLICIES OF THE COASTAL ACT IS TO PROTECT SUCH?

A. YES.

Q. SO THE COASTAL COMMISSION STAFF WAS REQUIRING THAT CERTAIN [p. 251] PROTECTIONS FOR THE HABITAT BE INCLUDED IN THE LAND USE PLAN?

A. THAT'S CORRECT.

Q. AND THESE - SCOPE OF THESE AND WHAT WOULD BE REQUIRED WAS THE SUBJECT OF NEGOTIATIONS BETWEEN THE CITY AND THE COASTAL COMMISSION STAFF?

A. THAT'S CORRECT.

Q. BECAUSE THEY DIDN'T ALWAYS SEE EYE TO EYE?



A. RIGHT.

Q. AND YOU, OR SOMEBODY ON BEHALF OF PONDEROSA, PARTICIPATED IN THOSE?

A. YES.

Q. NOW, I'VE HANDED YOU EXHIBIT 26, WHICH IS AN IMPOSING LOOKING DOCUMENT. YOU CAN TAKE YOUR TIME TO LOOK AT IT, BUT I WILL TELL YOU IT'S A CITY MEMORANDUM WHICH INCLUDES AS AN ATTACHMENT INFORMATION FROM THE COASTAL COMMISSION.

IS THAT BASICALLY CORRECT?

A. THAT IS WHAT IT APPEARS TO BE, YES.

Q. AND THE FIRST PART - IT'S DATED FEBRUARY 1, 1984?

A. YES.

Q. AND IT DEALS WITH THE LOCAL LAND USE PLAN FOR THE DEL MONTE BEACH AREA?

A. YES.

Q. AND ATTACHED TO THIS IS A REPORT BY THE COASTAL COMMISSION STAFF, CORRECT?

A. YES.

[p. 252] Q. YOU'VE SEEN REPORTS SUCH AS THIS BEFORE IN YOUR WORK WITH THE COASTAL COMMISSION?

A. YES.

Q. WHEN A CITY SUBMITS A PROPOSED LAND USE PLAN TO THE STAFF, IT IS COMMON FOR THE

STAFF TO - IF THEY HAVE COMPLAINTS - TO CRITIQUE THE THINGS THAT THEY THINK ARE WRONG WITH THE PLAN, RIGHT?

A. YES.

Q. AND THEY WILL ALSO, AT LEAST, SOMETIMES INDICATE WHAT TYPES OF ADDITIONS WOULD BE REQUIRED TO THE LAND USE PLAN IN ORDER FOR THEM TO RECOMMEND THAT THE COASTAL COMMISSION ITSELF APPROVE IT?

A. YES.

Q. AND THE REPORT THAT IS ATTACHED TO THE CITY MEMORANDUM IS THAT KIND OF REPORT AND INCLUDES THOSE KINDS OF RECOMMENDATIONS, CORRECT?

A. YES.

Q. TURN TO PAGE 32. WE HAVE A BLOWUP HERE. THIS IS A SERIES OF MODIFICATIONS THAT WOULD RESULT IN CERTIFICATION DEALING WITH ENVIRONMENTALLY SENSITIVE HABITATS?

A. YES.

Q. IF YOU LOOK DOWN AT THE BOTTOM IN AREAS OF DUNE HABITAT, THEY WERE SAYING THAT A DUNE RESTORATION PROGRAM WOULD BE REQUIRED AS A CONDITION OF APPROVAL FOR ANY NEW DEVELOPMENT?

A. YES.

[p. 253] Q. THE CITY HAD AS ITS PROPOSAL THAT SUCH A PROGRAM WOULD BE REQUIRED

ONLY FOR DEVELOPMENT THAT DISTURBS DUNE VEGETATION?

A. YES.

Q. THEN THE REPORT GOES ON TO SPECIFY IN SUBSTANTIAL DETAIL WHAT IT WANTS INCLUDED IN A DUNE RESTORATION PROGRAM, CORRECT?

A. YES.

Q. IF YOU WOULD TURN TO PAGE 34. THESE ARE SOME MORE OF THE RECOMMENDATIONS FOR REQUIREMENTS TO BE IMPOSED BY THE COASTAL COMMISSION STAFF?

A. YES.

Q. IF YOU LOOK -

A. I BELIEVE THIS IS THE CITY PLAN, BUT IT HAS BEEN MARKED UP BY THE COASTAL STAFF; IS THAT CORRECT?

Q. THIS IS WHAT THE COASTAL COMMISSION STAFF IS SAYING HAS TO BE DONE IN ORDER FOR IT TO APPROVE IT?

A. UH-HUM.

Q. IF YOU LOOK IN THE MIDDLE OF PAGE 34, IT DEALS WITH WHAT TYPES OF CRITERIA AND APPROVALS ARE NEEDED WHERE YOU HAVE ENVIRONMENTALLY SENSITIVE HABITAT, CORRECT?

A. YES.

Q. AND IT PROVIDES THAT PRIOR TO LOCAL COASTAL PLAN CERTIFICATION, THE PLANS AND

MAPS DEALING WITH THE PROPOSED PROTECTION AND RESTORATION PLAN HAVE TO BE APPROVED BY THE COASTAL COMMISSION IN CONSULTATION WITH THE DEPARTMENT OF FISH AND GAME AND U.S. FISH AND WILDLIFE?

[p. 254] A. YES.

Q. IT ALSO PROVIDES RIGHT BELOW THAT AS A NEW POLICY, DELETING THE OLD POLICY, THAT ALL ESH, THAT IS, ENVIRONMENTALLY SENSITIVE HABITAT, SHOULD BE PROTECTED BY LOCATING NEW DEVELOPMENT SO AS TO AVOID THE HABITAT?

A. YES.

Q. AND THESE ARE POLICIES THAT WERE BEING REQUIRED BY THE COASTAL COMMISSION?

A. YES.

\* \* \*

[p. 271] Q. AM I CORRECT THAT WHEN YOU WENT AND APPEARED BEFORE THE CITY COUNCIL AT THE SEPTEMBER HEARING, YOU UNDERSTOOD THAT YOU WOULD HAVE THE RIGHT TO BUILD A 190-UNIT DEVELOPMENT WITH THAT ROAD CONFIGURATION, WITH THAT GENERAL PLACEMENT ON THE SITE SO LONG AS YOU COULD SATISFY THE CONDITIONS?

A. YES.

Q. AND YOU WERE ALSO AWARE THAT IF IN YOUR EFFORT TO SATISFY THE CONDITIONS THAT IT BECAME NECESSARY TO MODIFY THE SITE PLAN,



YOU WOULD HAVE TO COME BACK AND GET NEW APPROVAL?

A. YES.

\* \* \*

[p. 332] DONALD BRIGHT - DIRECT/JACOBSEN

Q. DID YOU IN THAT SAME SUMMER PREPARE, AS PART OF THE DEVELOPMENT, SOME RESTORATION PLANS CONCERNING THE SMITH'S BLUE BUTTERFLY?

A. I THINK WE PREPARED RESTORATION PLANS BEFORE, AS I REMEMBER. OVERALL, WE HAD ABOUT FIVE DRAFT AND FINAL RESTORATION PLANS. BUT WE DID MODIFY THE THEN APPLICABLE RESTORATION PLAN, CHANGING IT TO TAKE INTO CONSIDERATION NOT ONLY THE PRESENCE OF THE BUTTERFLY IN THIS PARTICULAR PART OF THE PHILIPS PARCEL, BUT ALSO TO ACCOMMODATE SOME OF THE CONCERNS AND CRITICISMS THAT HAD BEEN RECEIVED FROM THE DEPARTMENT OF FISH AND WILDLIFE SERVICES AND DEPARTMENT OF FISH AND GAME.

Q. LET ME SHOW YOU EXHIBIT 50 AND 52 AND ASK YOU IF YOU RECOGNIZE THOSE?

A. YES, I DO.

Q. WHEN YOU FOUND THIS EVIDENCE OF THE BUTTERFLY, AN [p. 333] ENDANGERED SPECIES, ON THE PROPERTY, DID YOU REPORT THAT FINDING TO

THE PROPER AGENCIES WITH AUTHORITY OVER THE MATTER?

A. WE WERE KIND OF EXCITED ABOUT IT. INDEED, WE REPORTED IT TO THE CITY, TO FISH AND WILDLIFE SERVICE, FISH AND GAME, DEPARTMENT OF PARKS AND RESTORATION AND TO THE COASTAL COMMISSION.

Q. UP TO THE POINT WHERE YOU FOUND EVIDENCE OF THE BUTTERFLY, HAD ANYONE, WHETHER IT WAS MR. ARNOLD OR ANY OF THESE OTHER GOVERNMENTAL AGENCIES, HAD ANYONE ACTUALLY FOUND A BUTTERFLY ON THIS PROPERTY BEFORE YOU DID?

A. WHEN YOU SAY "BUTTERFLY," YOU ARE TALKING ABOUT A SMITH'S BLUE, AND THE ANSWER IS NO. THERE ARE BUTTERFLIES OF OTHER TYPES THERE, BUT NO SMITH BLUES, THAT'S CORRECT.

Q. YOU REPORTED THAT TO VARIOUS AUTHORITIES, YOUR FINDING?

A. YES, WE DID.

Q. GO TO EXHIBIT 52. THIS IS A PRELIMINARY AND A RESTORATION PLAN IN THOSE TWO EXHIBITS, AREN'T THERE [sic]?

A. YES.

Q. YOU PREPARED THOSE IN JUNE AND JULY OF '84?

A. THAT'S CORRECT.

Q. DESCRIBE FOR THE JURY - SUMMARIZE - WHAT WAS THE APPROACH YOU WERE TAKING IN THE RESTORATION PLAN?

A. WELL, I MENTIONED THOSE THREE PHILOSOPHICAL APPROACHES BEFORE, AND WE WERE TAKING THE ONE IN THE MIDDLE. WE KNEW THAT THE COASTAL COMMISSION'S COMMENTS ON THE CITY OF [p. 334] MONTEREY'S DEL MONTE DUNE LAND USE PLAN WERE PREDICATED ON DEVELOPMENT, RESIDENTIAL DEVELOPMENT, OCCURRING ON THIS SITE.

WE KNEW THAT THE CITY, ALTHOUGH THEY HAD EARLIER TALKED ABOUT THIS BEING OPEN SPACE, ALSO CONCLUDED SOME DEVELOPMENT SHOULD BE THERE. AND SO OUR GOAL WAS TO FIGURE OUT HOW TO MAXIMIZE THE PROTECTION OF THE HABITAT OF THE DUNES.

I WANT TO DISTINGUISH THAT FROM THE HABITAT OF THE SMITH'S BLUE BUTTERFLY. TO MAXIMIZE THE PRESERVATION OF THE HABITAT OF THE DUNES WHILE PUTTING IN THE MOST THOUGHTFUL MANNER THE PROPOSED DEVELOPMENT.

Q. IF YOU COULD SUMMARIZE. AND IF YOU NEED TO, YOU CAN COME HERE TO THE EXHIBIT.

WHAT, IN GENERAL, WERE YOUR PROPOSALS UNDER THE RESTORATION PLAN?

A. TO DEVELOP DUNES, A SERIES OF DUNES, SOME OF WHICH WOULD BE MAN-MADE, PARTICULARLY ON THE PORTION OF THE PROPERTY DOWN CLOSEST TO THE OCEAN. TO DEVELOP AN AREA

ALONG THE EASTERN THE MARGIN OF THE PROPERTY WHERE THE HABITAT THAT CONTAINED BUCKWHEAT WOULD REMAIN. TO MAKE SOME CLEAN-UP EFFORTS THROUGH HERE WHICH CONTAINED BUILDINGS.

THERE WAS AN EXISTING ROAD THAT WAS ALREADY THERE THAT CAME UP ACROSS THROUGH THIS PORTION OF THE BACK DUNES IT'S CALLED. THIS IS THE HIGHEST DUNES IS [sic] THE BACK PORTION OF THE PROPERTY. AND ALSO TO DO SOME RESTORATION IN THESE AREAS, [p. 335] THAT IS, TRY TO MAXIMIZE BY PLANTING THE DEVELOPMENT OF THE BUCKWHEAT WITH THE IDEA THAT IF YOU HAD ENOUGH BUCKWHEAT THERE, YOU MIGHT HAVE THE RIGHT HABITAT SO THE SMITH'S BLUE BUTTERFLY WOULD COME ACROSS FROM OTHER AREAS AND EXPAND.

Q. YOU MENTIONED SOMETHING ABOUT THE NATURE OF THIS SITE THAT YOU WERE WORKING WITH. LET ME PUT IT IN TIME CONTEXT FOR YOU. IN JULY OF '84, WHEN YOU'RE LOOKING AT THESE RESTORATION PLANS OF YOURS, YOUR PROPOSALS, PONDEROSA HADN'T YET BUILT ANYTHING ON THIS PROPERTY, HAD IT?

A. NO.

Q. IT WAS GOING THROUGH AN APPROVAL PROCESS AT THAT TIME?

A. YES.



Q. COULD YOU, FROM THE PERSPECTIVE OF THE BIOLOGIST, DESCRIBE FOR THE JURY THE CONDITION OF THE PROPERTY AS IT EXISTED IN JULY '84 IN RELATION TO THE PROBLEMS IT CREATED FOR THE RESTORATION PLAN?

A. ONE OF THE REASONS WE CAME TO THE CONCLUSION THAT IT WAS A DAMAGED SITE AND THAT IT WOULD NEED THOUGHTFUL DEVELOPMENT TO PRESERVE ANY SIGNIFICANT HABITAT WAS THE FACT THAT THE SITE ITSELF WAS HIGHLY DISTURBED. AN INTERCEPTOR LINE, A SEWER LINE, HAD BEEN PUT THROUGH ALONG THE AREA SEVERAL HUNDRED FEET IN FROM THE OCEAN, AND AS A MITIGATION MEASURE, AND IN MY VIEW AN INAPPROPRIATE ONE, THE INSTALLATION HAD BEEN CONDITIONED BY THE DEVELOPMENT OF A BIG BERM OVER THE TOP OF THAT AREA.

Q. BY THE INTERCEPTOR LINE, AM I INDICATING THE SEWER LINE [p. 336] HERE?

A. THAT'S CORRECT. THEY PUT A BERM OVER THE TOP OF THAT, AND ON TOP OF THE BERM THEY ADDED JUTE MATTING AND PLANTED TREES, SOME OF WHICH ARE NOT EVEN ENDEMIC TO CALIFORNIA. THEY WENT TO SOME NURSERY AND PURCHASED THESE.

SO IT WAS AN ATTEMPT TO STABILIZE THE DUNE, NOT AN ATTEMPT IN ANY WAY TO MAXIMIZE THE NATIVE HABITAT ON THE SITE. SO THAT WAS AN AREA LARGELY NON-NATIVE AND CERTAINLY MAN-MADE.

THERE WERE ALL THE TANK PADS. HIGH PERCENTAGE, ABOUT 25 PERCENT OF THE BOWL, WAS COVERED BY ICE PLANT WHICH WAS INTRODUCED, TWO SPECIES OF ICE PLANT. AND IT IS VERY COMPETITIVE.

THE ICE PLANT PRODUCES A FAIR AMOUNT OF MATERIAL. IT'S A CHEMICAL WHICH IT RELEASES INTO THE GROUND THAT LITERALLY PRECLUDES OTHER PLANT SEED FROM GERMINATING. SO IT CLEARS THE AREA AS IT MOVES OUT. IT'S A SLOW MOVER. IT DOESN'T GROW FAST. AS IT MOVES OUT, IT HAS A TENDENCY TO PRODUCE THIS CHEMICAL WHICH KILLS OFF OTHER SEEDS SO OTHER PLANTS DON'T GERMINATE.

THERE WERE THE PIPELINES, THERE WERE THE ROADWAYS, THERE WERE MANY AREAS WHERE THERE WAS WHAT I WOULD CALL ASPHALTENE MATERIAL, NOT ASPHALT THAT DIDN'T HAVE ANY ROCKS IN IT, BUT HARD TARRING MATERIALS AS A RESULT OF THE ACTIVITIES AROUND THE TANKS.

DUNE BUGGIES HAD BEEN IN THERE, OFF-ROAD VEHICLES. [p. 337] SO THERE WERE A LOT OF TRAILS IN THERE. ALSO WAS A HAVEN FOR TRASH. IT WAS AN UNOCCUPIED SITE. IF YOU CAN FIND YOUR WAY AROUND THE CORNER, YOU COULD DUMP TRASH IN THEIR VERY EASILY.

I HAD ONE FEMALE STAFF MEMBER ON THIS SITE, BUT NEVER COULD SEND HER THERE ALONE BECAUSE WE HAD THREE HOMELESS PEOPLE ON THE SITE. SO I WOULD NEVER SEND HER THERE ALONE.

SO IT WAS A DIFFICULT SITE IN TERMS OF TRYING TO FIND WHAT YOU WOULD CALL REAL, TRUE NATIVE HABITAT. AND ALL THE REGULATORY AGENCIES, AND EVEN RICHARD ARNOLD, AGREED TO THAT. HIS DESCRIPTION IN HIS FIRST PUBLISHED PAPER WAS THAT THIS SITE WAS DECIMATED. THE FISH AND WILDLIFE SERVICE CONSIDERED THIS A HIGHLY DAMAGED SITE. AND I THINK WHAT I HAVE JUST POINTED OUT REFLECTS THE REASON FOR THAT CONCLUSION.

Q. THE ICE PLANT YOU DESCRIBED, WAS THAT IN WHAT MR. DAVIS REFERRED TO EARLIER AS THIS BOWL AREA?

A. IT WAS LARGELY AROUND EACH OF THE TANK PADS. THE TANK PADS ARE ALL WITHIN THE BOWL. AND BASED ON MY EXPERIENCE IN OTHER REFINERIES AND IN TALKING TO PEOPLE OVER THE YEARS, THE REASON IT WAS PLACED THERE WAS TO CUT DOWN ON EROSION SO THE TANK PAD WOULD NOT BE UNDERCUT AND SO THAT THE SAND WOULDN'T FALL OUT FROM UNDERNEATH THE TANK PAD AND THE TANK WOULD HAVE COLLAPSED OR SLIPPED OVER TO ONE SIDE AND YOU WOULD HAVE A LEAK.

Q. IS ICE PLANT NATIVE TO THAT AREA?

A. IT IS NOT. IT IS NOT EVEN NATIVE TO NORTH AMERICA.

[p. 338] Q. YOU MENTIONED ICE PLANT IS COMPETITIVE WITH OTHER PLANTS.

DOES THAT INCLUDE BUCKWHEAT?

A. IT PRECLUDES THEM. IT'S MORE THAN COMPETITIVE. IT MOVES IN AND PRODUCES A CHEMICAL WHICH KEEPS OTHER PLANT SEEDS FROM GERMINATING, AND THAT INCLUDES BUCKWHEAT.

Q. I GUESS WHAT I'M TRYING TO ASK IS IN A CONTEST BETWEEN ICE PLANT AND BUCKWHEAT, WHICH WINS?

A. THE ICE PLANT DOES. THE ICE PLANT MOVES VERY SLOWLY. SO THE BUCKWHEAT WOULD HAVE A WHILE IF IT IS A DISTANCE AWAY, 30 FEET, FOR EXAMPLE, FROM A LARGE ACCUMULATION OF ICE PLANT. IT WILL BE A LONG TIME BEFORE THE ICE PLANT GETS THERE. ONCE IT GETS THERE, IT WILL WIN BECAUSE IT PRODUCES THAT CHEMICAL.

Q. DID YOU DISCOVER ANY OF THIS LATIFOLIUM-TYPE BUCKWHEAT IN THE BERM AREA?

A. YES.

Q. CAN YOU DESCRIBE FOR THE JURY IN WHAT CONDITION YOU FOUND THAT TYPE OF BUCKWHEAT?

A. THE MAJORITY WERE JUVENILE. THEY WERE ISOLATED WITH CLUMPS OF MAYBE TWO OR THREE INDIVIDUALS. AND THEY WERE IN THE AREAS BETWEEN THE TANK PADS AND THE ROADS AND THE PIPELINE RIGHT OF WAYS AND SO ON.

Q. AS JUVENILE BUCKWHEAT, WOULD THAT BE SMITH'S BLUE BUTTERFLY HABITAT?



A. NO. AS I POINTED OUT BEFORE, YOU NEED THE FLUORESCENCE FOR THE NECTAR FOR THE MATING AND LARVAL DEVELOPMENT.

[p. 339] Q. THEY HAVE TO BE ADULT PLANTS?

A. ADULT PLANTS.

Q. OVER TIME IF NOTHING WERE DONE IN THIS BOWL AREA, THIS OWNER JUST LET IT SIT, WHAT WOULD HAVE HAPPENED BETWEEN THE ICE PLANT AND THE BUCKWHEAT WITHIN THE BOWL AREA?

A. THE ICE PLANT WOULD ULTIMATELY OCCUPY A SIGNIFICANT PERCENTAGE, IF NOT ALL, OF THE BOWL AREA.

Q. WOULD HAVE WON THE COMPETITION?

A. YES. THE ONLY COMPETITION IT CAN'T BEAT IS SAND, SAND EROSION. SO IF THE SAND ERODES FROM THE DUNE AND BLOWS OVER AND COMPLETELY COVERS UP THE ICE PLANT SO IT NO LONGER IS ABLE TO PHOTOSYNTHESIZE, IT WILL DIE. SO THAT IS THE ONE TIME IT WOULD LOSE, IF THERE WAS A MASSIVE MOVEMENT OF SAND.

Q. YOU SAID AT THE TIME IN THE SUMMER OF '84 THAT YOU WERE OUT HERE DOING YOUR SURVEYS AND LOOKING FOR THE BUTTERFLIES, OR EVIDENCE OF THEM.

WERE YOU IN COMMUNICATION WITH AGENCIES, SUCH AS UNITED STATES FISH AND WILDLIFE AND STATE FISH AND GAME?

A. YES.

Q. WERE YOU IN TOUCH WITH THIS RICHARD ARNOLD?

A. YES.

Q. WHEN YOU WOULD PREPARE A RESTORATION PLAN OR COME UP WITH SOME PROPOSAL, WOULD YOU SHARE IT WITH THOSE AGENCIES AND THOSE PEOPLE?

A. YES. THAT INCLUDES THE CITY AS WELL.

[p. 340] Q. THE CITY OF MONTEREY?

A. YES.

Q. WHAT WAS THE PURPOSE OF YOU SENDING YOUR REPORTS OUT TO ALL THESE PEOPLE?

A. WELL, THERE WERE THREE ISSUES HERE. ONE IS THE DEL MONTE DUNES LAND USE PLAN HAD NOT BEEN APPROVED. THEREFORE ONCE PONDEROSA HAD GOTTEN ITS APPROVAL, CONDITIONAL USE PERMIT FROM THE CITY OF MONTEREY, WE STILL HAD TO GO GET A PERMIT FROM THE COASTAL COMMISSION.

SO WE NEEDED TO BE SURE THAT WHEN WE GOT APPROVAL THAT THE CITY OF MONTEREY DIDN'T INCLUDE SOME PROVISION OR CONDITION THAT THE COASTAL COMMISSION WOULDN'T ACCEPT. WE KNEW WE HAD THE POTENTIAL FOR A RARE AND ENDANGERED SPECIES. THEREFORE, WE HAD TO DEAL WITH THAT HABITAT RECOVERY PLAN WHICH HAD BEEN PREPARED BY THE FISH

AND WILDLIFE SERVICE. SO THEY NEEDED TO BE INVOLVED.

CALIFORNIA FISH AND GAME, ALTHOUGH THERE IS NO LAW IN THIS STATE WHERE THEY CONTROL THE INSECTS, IS CONCERNED ABOUT PRESERVATION OF HABITATS, AND IT WAS APPROPRIATE TO HAVE THEM IN.

THEN IT WAS ALSO APPROPRIATE TO HAVE THE CALIFORNIA DEPARTMENT OF PARKS AND RECREATION INVOLVED BECAUSE THEY OWNED, AT THAT POINT IN TIME, THE LAND THAT WAS IMMEDIATELY TO THE EAST BETWEEN THE EASTERN BOUNDARY OF THE PHILIPS PROPERTY AND THE WESTERN END OF THE HOLIDAY INN, THE HOTEL.

[p. 341] Q. LET ME SHOW YOU EXHIBIT 67, WHICH IS AN AUGUST 29, 1984 MEMORANDUM FROM ONE PLANNER TO THE PLANNING DIRECTOR OF THE CITY OF MONTEREY.

SPECIFICALLY, DO YOU SEE WHERE THAT MEMO REFERS TO THE SITE RESTORATION PLAN FOR PHILIPS PETROLEUM?

A. YES.

Q. THE FIRST SENTENCE SAYS:

"FOLLOWING A SERIES OF CALLS AND CORRESPONDENCE BETWEEN BRIGHT AND ASSOCIATES, U.S. FISH AND WILDLIFE SERVICES AND DOCTOR RICHARD ARNOLD."

DO YOU RECALL YOU WERE TALKING WITH ALL THOSE PEOPLE IN THE SUMMER OF '84?

A. YES. IT SAYS LATER IN THAT PARAGRAPH DOCTOR ARNOLD RELAYED TO MR. FELL, WHO WAS THE CITY PERSON WHO WROTE THIS MEMO, THE RESULTS OF A MEETING THAT OCCURRED THE NIGHT BEFORE WITH MYSELF AND MY DAUGHTER, WHO WAS ON THE STAFF AT THAT TIME, AND DOCTOR ARNOLD AT HIS HOME.

Q. YOU ACTUALLY WENT TO DOCTOR ARNOLD'S HOME?

A. THAT'S CORRECT.

Q. IN THE SECOND PARAGRAPH THERE IS A REFERENCE TO THE HABITAT IN THE EASTERN PORTION OF THE SITE, MR. ARNOLD WANTING THE HABITAT IN THE EASTERN PORTION OF THE SITE PRESERVED.

DO YOU SEE THAT REFERENCE?

A. I DO.

Q. IN YOUR RESTORATION PLAN THAT YOU HAD, YOU PROPOSED TO [p. 342] PRESERVE THE HABITAT IN THE EASTERN PORTION OF THE SITE?

A. CORRECT.

Q. SO YOU AGREED TO DO THAT?

A. THAT IS ONE OF THE CHANGES THAT WAS MADE IN THE PLAN.

Q. THERE IS THE FURTHER STATEMENT HERE THAT DOCTOR ARNOLD, AND I QUOTE:

"FELT THAT EVEN WITH A GOOD RESTORATION PLAN, THE BUTTERFLIES ON THIS SITE



WOULD BE ISOLATED FROM OTHER HABITAT ON OTHER SITES WITHIN THEIR RANGE AND THUS WOULD BE VULNERABLE TO EXTINCTION." DO YOU SEE THAT PHRASE?

A. I DO.

Q. YOU HAD TALKED TO MR. ARNOLD THE NIGHT BEFORE, HAD YOU?

A. YES.

Q. WHEN HE'S REFERRING TO THE FACT THAT EVEN WITH A GOOD RESTORATION PLAN, EXTINCTION WOULD OCCUR BECAUSE THEY WOULD BE AWAY FROM OTHER SITES.

WHAT SITES IS HE TALKING ABOUT?

A. I'M NOT SURE. BECAUSE IN MY VIEW, THIS SITE WAS ALREADY ISOLATED.

Q. BUT WERE THERE SO MANY OTHER SITES IN THAT AREA?

A. THERE IS A SITE A MILE OR SO TO THE WEST AT THE NAVY POSTGRADUATE SCHOOL, AND THEN THERE IS A SERIES OF DUNE AREAS ABOUT TWO MILES TO THE NORTH ASSOCIATED WITH FORT ORD.

THERE WAS AN ACCUMULATION IN SAND CITY, WHICH IS [p. 343] SORT OF IN BETWEEN THOSE WHICH HAD BEEN HIGHLY DISTURBED, BUT EACH OF THESE HAD AROUND THEM ENOUGH MAN-MADE STRUCTURES TO ESSENTIALLY LEAVE THEM ISOLATED.

Q. YOU MENTIONED TO THE JURY EARLIER THESE BUTTERFLIES IN THEIR ONE WEEK OF LIFE MIGHT BE ABLE TO FLY OR SKIP OR HOP, WHATEVER, A HUNDRED FEET OR 200 FEET OR SO?

A. THAT IS THE MAXIMUM DISTANCE KNOWN, YES.

Q. DO I UNDERSTAND THAT WHEN THEY FLY OR HOP AND JUMP, WHATEVER IT IS, THIS 200 FEET, THEY HAVE TO FIND A NEW BUCKWHEAT PLANT, DON'T THEY?

A. TO BE SUCCESSFUL, YES. AND THEY NEED TO FIND ONE WHICH IS MATURE AND HAS THE RIGHT FLUORESCENCE.

Q. AT THE TIME DOCTOR ARNOLD IS SAYING THAT EVEN WITH A GOOD RESTORATION PLAN THERE COULD BE EXTINCTION BECAUSE OF THESE OTHER SITES, WAS THERE ANY WAY FOR BUTTERFLIES TO GET FROM THE SUBJECT PROPERTY TO THE NAVAL POSTGRADUATE SCHOOL?

A. NOT IN MY VIEW.

Q. WHAT STOOD IN THEIR WAY?

A. SEVERAL THINGS: THE HOUSING DEVELOPMENT, ALL THE STRUCTURES THAT EXISTED ON THE BACK SIDE OF THE DUNE, AND THE BACK SIDE OF THE DUNE CONTAINED A SERIES OF PLANTED EUCALYPTUS TREES, AN ACCUMULATION OF OAK TREES, AND THERE WAS AN EXISTING ROAD ALREADY THERE. ALL OF THOSE WOULD BE IMPEDIMENTS, SIGNIFICANT IMPEDIMENTS, TO THE MOVEMENT OF THIS BUTTERFLY FROM EITHER THE

EAST TO THE WEST TO GO FROM THIS SITE TO THE [p. 344] POSTGRADUATE SCHOOL OR TO COME FROM THE POSTGRADUATE SCHOOL TO HERE. THERE WERE A NUMBER OF OTHER DEVELOPMENTS FURTHER TO THE EAST WHICH WOULD HAVE PRECLUDED ANY MOVEMENT FROM THE FORT ORD SITES.

Q. SUCH AS THE HOTEL?

A. YES.

Q. AND HIGHWAY 1?

A. HIGHWAY 1.

Q. COULD THOSE BUTTERFLIES HAVE FLOWN OR SKIPPED OVER HIGHWAY 1?

A. THEY MIGHT HAVE BEEN ABLE TO DO THAT IN TERMS OF DISTANCE, BUT UNLESS THEY FOUND A HOLE IN THE TRAFFIC WHERE THE VELOCITY OF THE CAR WOULD NOT BE STIRRING UP ALL THE WIND, THEY WOULD NOT BE ABLE TO FIND THEIR WAY ACROSS, AND THEY MIGHT GET ALL THE WAY OVER THERE AND COULD ONLY GO A COUPLE OF HUNDRED FEET AND END UP IN AN AREA WHERE THERE WAS NO BUCKWHEAT.

Q. SO DOCTOR ARNOLD WAS LOOKING AT YOUR RESTORATION PLANS IN 1984 AND THOUGHT NO MATTER WHAT YOU DID ON THE SITE, NO MATTER, HOW GOOD YOUR RESTORATION PLAN WAS, THIS SMITH'S BLUE BUTTERFLY COULD STILL GO EXTINCT, CORRECT?

MR. YUHAS: OBJECTION. LEADING.

THE COURT: SUSTAINED.

Q. (BY MR. JACOBSEN) WHAT WAS HIS VIEW ON THAT?

A. DOCTOR ARNOLD'S VIEW, AS FAR AS I WAS CONCERNED, WAS NO DEVELOPMENT WAS APPROPRIATE FOR THIS SITE; WE NEED TO LEAVE IT [p. 345] AS AN OPEN SITE AND TO REMOVE ANY IMPEDIMENTS THAT ARE THERE SO THAT THE POTENTIAL WOULD BE THERE FOR MIGRATION.

IN MY VIEW EVEN IF WE HAD DONE ALL THAT AND THE POTENTIAL WAS IMPROVED BY THE REMOVING OF THE BUILDINGS AND THE TREES AND THE ROAD AND SO ON ON THE BACK SIDE OF THE DUNE, THE DISTANCE WAS SO GREAT AND THERE WERE SO MANY OTHER MAN-MADE STRUCTURES IN THE VICINITY THAT THE LIKELIHOOD OF CROSS FERTILITY OF ONE MEMBER FROM ONE GROUP MOVING TO ANOTHER WAS EXTREMELY REMOTE.

Q. ON PAGE 2 OF THAT MEMO THE PLANNER HERE, UNDER NUMBER 2, TALKS ABOUT IN THE SUMMER OF '84 THAT:

"THE APPLICANT COULD BE ASKED TO REVISE HIS PLAN BY REMOVING STRUCTURES IN THE EASTERN PART OF THE SITE TO OBTAIN MORE EFFECTIVE CONTIGUOUS HABITAT ALONG THAT BOUNDARY."

DO YOU SEE THAT REFERENCE?

A. I DO.



Q. HERE, OF COURSE, WE ARE TALKING ABOUT A PLAN THAT WAS APPROVED AFTER THAT MEMO, BUT DID YOU, AS PART OF YOUR RESTORATION PLAN, FOLLOW THAT PLANNING STAFF MEMBER'S RECOMMENDATION AND MAKE A HABITAT CONTIGUOUS ALONG THE EASTERN PART OF THE PROPERTY?

A. AFTER DISCUSSIONS WITH FISH AND WILDLIFE SERVICE, FISH AND GAME AND COASTAL COMMISSION, IRRESPECTIVE OF WHAT THE STAFF MEMBER SAYS, IT WAS CLEAR THAT IN ORDER TO GET THEIR GENERAL [p. 346] APPROVAL FOR WHAT WAS BEING PROPOSED THAT WE WERE GOING TO HAVE TO LEAVE MORE OF THAT AREA IN A NATURAL CONDITION.

ONE OF THE EARLIER VERSIONS HAD CREATING LAND DUNE IN THAT AREA AFTER THE LAND HAD BEEN GRADED. THAT WAS THROWN OUT. THE HOUSING PROJECT ULTIMATELY WAS SHIFTED TO THE WEST. THE WIDTH OF THAT STRIP WAS INCREASED.

BUT YOU CAN'T LOOK AT IT IN THAT NARROW CONTEXT. YOU MUST ALSO LOOK TO THE FACT THAT IMMEDIATELY TO THE EAST OF THE EASTERN CROWN OF THIS PROPERTY IS THE STATE PARKS PROPERTY ON WHICH THERE ARE BUCKWHEATS. SO WE WERE ADDING THIS STRIP TO THE BUCKWHEAT AREA AND, THEREFORE, LEAVING A MUCH BROADER SITE WHICH POTENTIALLY COULD SERVE AS A BREEDING AREA FOR THE SMITH'S BLUE BUTTERFLY.

Q. ALONG THE EASTERN PROPERTY LINE THERE IS NOT A WALL. IT'S THE SAME HABITAT ON THE OTHER SIDE OF IT?

A. BUTTERFLIES DON'T KNOW ANYTHING ABOUT POLITICAL BOUNDARIES.

Q. OR LOT LINES?

A. OR LOT LINES.

Q. YOU TESTIFIED YOU HAD BEEN DEALING WITH THE COASTAL COMMISSIONER ON THIS AS WELL DURING THE PERIOD 1983 AND '84?

A. YES.

Q. WHO AT THE COASTAL COMMISSION WERE YOU TALKING TO DURING THAT TIME PERIOD?

A. FOR PURPOSES OF SPECIFICS, I TALK TO MICHAEL FISHER, WHO [p. 347] WAS THE EXECUTIVE DIRECTOR, TO ED BROWN, WHO DIRECTED THE DISTRICT OFFICE IN SANTA CRUZ, AND SENIOR PLANNER DAVID LOOMIS. AND DAVID HAD BEEN WITH THE COASTAL COMMISSION FOR SOME TIME. IN POINT OF FACT, WHEN I WAS ON THE COMMISSION IN THE SOUTH COAST, HE WORKED IN THE LONG BEACH OFFICE.

AND WHAT WE WERE TRYING TO DO WAS TO COME UP WITH A CONSENSUS BETWEEN THE DIFFERENCES OF OPINION OVER THE DEL MONTE DUNES LUP BETWEEN WHAT THE CITY WANTED TO DO AND WHAT THE COASTAL COMMISSION THOUGHT THEY SHOULD DO.

IF THE DEL MONTE DUNES LUP HAD NOT BEEN APPROVED ONCE WE GOT AN APPROVAL, WE KNEW WE HAD TO GO BACK TO THE COASTAL COMMISSION. IT WOULD HAVE BEEN FUTILE TO HAVE GOTTEN PERMISSION FROM THE CITY KNOWING WHEN WE WALKED INTO THE COASTAL COMMISSION OFFICE, WE WOULD BE DENIED.

SO WE NEEDED DO WORK THOSE THINGS TOGETHER. THAT IS WHAT WE ATTEMPTED TO DO. PART OF THE EFFORT WAS TO POINT OUT THAT THE CITY WASN'T AS BAD AS THE COASTAL COMMISSION THOUGHT, AND VICE VERSA, AND THEN TO LOOK FOR WAYS TO RESOLVE THE DIFFERENCES.

AND FOR THIS SITE THE DIFFERENCES LARGELY CENTERED AROUND HOW MUCH YOU LEFT BACK FROM THE MEAN HIGH TIED [sic] LINE AS PUBLIC USABLE PROPERTY, HOW YOU GOT IN AND OUT OF THE SITE, WHAT YOU CALL INGRESS AND EGRESS, AND WHAT YOU DID ON THE BACK DUNE.

\* \* \*

[p. 370] Q. IN THAT LETTER FISH AND GAME ADVISES THE CITY THAT THEY CONCUR WITH FISH AND WILDLIFE'S POSITION, DON'T THEY?

A. CORRECT.

Q. THAT IS, THIS PROJECT - THAT THE SUBJECT PROJECT WOULD BE OF LITTLE CONSEQUENCE TO THE BUTTERFLY SPECIES AS A WHOLE, THAT WAS THEIR FINDING?

A. CORRECT.

Q. LATER IN THAT LETTER - DID THIS LETTER APPROVE YOUR RESTORATION PLAN?

A. IT DID.

Q. THERE WERE THREE THINGS THAT FISH AND GAME WANTED. ONE WAS TO ADD A PROVISION TO THE HOMEOWNER'S ASSOCIATION WHICH REQUIRED THE HOMEOWNER'S ASSOCIATION TO BE RESPONSIBLE FOR MAINTAINING THE HABITAT AREA.

DO YOU SEE THAT REFERENCE?

A. YES.

Q. WAS THAT AGREEABLE TO YOU?

A. YES.

Q. DID YOU MAKE THAT PART OF YOUR RESTORATION PLAN?

A. PONDEROSA ACCEPTED THAT. IT WAS PART OF THE PLAN.

Q. SECONDLY, FISH AND GAME WANTED - THEY AGREED WITH FISH AND WILDLIFE THAT THE HABITAT UNDER RESTORATION BE MANAGED AS PART OF THE STATE LAND TO THE EAST.

[p. 371] DID YOU THEN MAKE THAT MODIFICATION TO YOUR RESTORATION PLAN?

A. WE DID.

Q. AND, THIRDLY, FISH AND GAME WANTED TO BE ADDED AS PART OF THE REVIEW GROUP FOR ANYTHING THAT HAPPEN IN THE FUTURE.



DID YOU AGREE TO THAT?

A. YES.

Q. DID FISH AND GAME EVER AT ANY TIME WITHDRAW THIS APPROVAL OF YOUR RESTORATION PLAN?

A. NO, NOT TO MY KNOWLEDGE.

Q. NOW, THERE WAS A MEMORANDUM YOU MENTIONED. LET ME FIRST GET TO ONE OTHER LETTER FROM FISH AND GAME, EXHIBIT 94. THAT IS A JULY LETTER FROM FISH AND GAME ADDRESSED TO YOU.

DO YOU REMEMBER RECEIVING THAT?

A. YES.

Q. AND IN THAT - YOU SENT THEM AN AMENDED PLAN, HADN'T YOU?

A. YES.

Q. THEIR RESPONSE TO THIS AMENDED PLAN WAS WHAT?

A. THEY SUPPORTED THE INFORMATION THAT WAS IN THE MAY 10TH LETTER THAT WE JUST WENT THROUGH WHICH CONSTITUTED THEIR APPROVAL.

THEY THEN ASKED THAT THE AREA DESIGNATED TO BE RESTORED AS THE SMITH'S BLUE BUTTERFLY HABITAT BE SUBSEQUENT TO RESTORATION. YOU KNOW, AFTER IT WAS OVER, IT WOULD BE DEDICATED TO A STATE AGENCY FOR FUTURE OPERATION.

[p. 372] Q. WAS THAT AGREEABLE?

A. THAT WAS AGREEABLE.

Q. BY DEDICATED, THAT MEANS ACTUALLY GIVEN FREE OF CHARGE TO THE STATE OF CALIFORNIA?

A. THAT'S RIGHT. DEDICATED, AS I IMAGINE ON THE TITLE OF A PROPERTY AS OPEN SPACE AND TRANSFERRED TO A STATE AGENCY FOR MANAGEMENT AND CONTROL.

THEN, FINALLY, THEY BELIEVED THERE WAS SOME AMBIGUITY BETWEEN WHAT THE PROPOSAL SHOWED FOR THE LOCATION OF THE UNITS AND WHAT THE COASTAL COMMISSION STAFF HAD REGARDING DEVELOPMENT WESTWARD OF SEA-FOAM AVENUE. THAT WAS AN ERROR ON MR. HUNTER'S PART AND THE SUBSEQUENT CONSERVANCY CORRECTED THAT ISSUE.

Q. YOU MENTIONED A CITY STAFF MEMO. LET ME SHOW YOU EXHIBIT 100. THAT IS AN AUGUST 13, 1985 MEMORANDUM FROM MR. NORTON - EXCUSE ME. I'M ON THE WRONG ONE. FROM MR. NORTON TO THE PLANNING DIRECTOR IN WHICH HE SAYS MR. ELLIOTT OF FISH AND GAME STATED THAT THEIR JULY 25 LETTER THAT YOU WERE JUST READING FROM DOES REPRESENT APPROVAL, SUBJECT TO THE CONDITIONS THEY LISTED IN THEIR EARLIER LETTER.

DID YOU SPEAK TO MR. ELLIOTT AMONG THE OTHER PEOPLE AT FISH AND GAME THAT WE HAVE BEEN TALKING ABOUT?

A. YES.

Q. AT ANY TIME AFTER THIS DATE, AUGUST 13, 1985, DID MR. ELLIOTT, OR ANY REPRESENTATIVE OF FISH AND GAME, ADVISE [p. 373] YOU IN ANY WAY THAT THE APPROVAL CONTAINED IN THEIR MAY AND JULY 1985 LETTERS HAD BEEN WITHDRAWN OR RESCINDED IN ANY WAY?

A. NO.

Q. MR. YUHAS YESTERDAY WAS ASKING MR. DAVIS ABOUT SOME MEETING THAT OCCURRED LATER IN '86 AT THE TIME THIS PROJECT WAS DENIED. HE READ FROM SOME MINUTES.

WERE YOU AT A MAY 1986 MEETING BEFORE THE CITY COUNCIL?

A. YES.

Q. DO YOU REMEMBER WHEN A MR. THOMPSON APPEARED ON BEHALF OF FISH AND GAME?

A. I'M NOT SURE THAT IS HIS NAME. IS IT JOHNSON OR THOMPSON?

Q. LET ME GET THE EXACT NAME. YOU RECALL A JOHNSON FROM FISH AND GAME BEING THERE?

A. SEEMS TO RING A BELL. HE WAS A LOCAL REPRESENTATIVE WORKING FOR MR. HUNTER.

Q. DID MR. JOHNSON SAY AT THAT HEARING THAT THE APPROVAL IN THEIR MAY 10TH AND JULY

25TH LETTERS HAD BEEN WITHDRAWN IN ANY WAY?

A. NO.

Q. WAS MR. JOHNSON -

WHAT POSITION DID MR. JOHNSON HAVE WITH FISH AND GAME?

A. I'M NOT SURE. I THINK HE'S JUST A FIELD STAFF MEMBER IN THAT PARTICULAR REGION FOR FISH AND GAME.

[p. 374] Q. YOU GOT LETTERS FROM MR. PARNELL.

WHO IS MR. PARNELL?

A. CALIFORNIA DIRECTOR OF THE DEPARTMENT OF FISH AND GAME.

Q. WHO IS MR. HUNTER?

A. MR. HUNTER IS THE MANAGER FOR REGION 5 IN WHICH THIS SITE IS LOCATED. THERE ARE FIVE REGIONS. CALIFORNIA IS DIVIDED INTO FIVE REGIONS FOR MANAGEMENT OF FISH AND GAME RESOURCES.

Q. SO WHEN YOU WERE TALKING WITH REPRESENTATIVES OF THE FISH AND GAME IN TERMS OF APPROVAL, DID YOU TALK TO THE PEOPLE IN CHARGE, LIKE THE DIRECTORS AND REGIONAL MANAGERS, OR DID YOU TALK TO THE FIELD STAFF?



A. WE TALKED TO THE PEOPLE WHO WERE IN CHARGE, BECAUSE THIS WAS A MANAGEMENT DECISION.

Q. GOING BACK TO THE FISH AND WILDLIFE LETTER WITH THE APPROVAL, HERE MR. NORTON IS EXPLAINING THAT FISH AND WILDLIFE'S BIOLOGICAL OPINION WAS THAT THE PROJECT WOULD NOT JEOPARDIZE THE CONTINUED EXISTENCE OF THE SMITH'S BLUE BUTTERFLY.

DID YOU AGREE WITH THAT ASSESSMENT BY FISH AND WILDLIFE?

A. YES.

Q. MR. NORTON NOTES THE HEAD OF FISH AND WILDLIFE, OR THE PERSON MAKING THE OPINION, ALSO CONTAINED RECOMMENDATIONS AS TO HOW RESTORATION COULD BEST BE IMPLEMENTED.

WERE THOSE RECOMMENDATIONS IN THE MARCH 22, '85 [p. 375] LETTER?

A. THEY WERE.

Q. DID YOU INCORPORATE THOSE RECOMMENDATIONS OF FISH AND WILDLIFE INTO YOUR RESTORATION PLAN?

A. TO THE MAXIMUM DEGREE THEY WERE FEASIBLE BASED UPON THE REQUIREMENTS OF THE CITY FOR THE VIEW VISTA BLOCKING DUNE WHICH REPRESENTED A BIT OF A PROBLEM FROM A BIOLOGICAL POINT OF VIEW AND BASED UPON THE CHANGES TO THE ENTRY THROUGH DEL MONTE

AVENUE TO MEET THE COASTAL COMMISSION CONCERNS ABOUT MINIMIZING THE IMPACTS TO THE BACK DUNE.

SO THE POINT IS WE DID MOST OF THE THINGS WE COULD DO WITHIN THE LIMITS THAT WERE ALLOTTED TO US. THERE ARE OTHER AGENCY CONSTRAINTS THAT PRECLUDED DOING WHAT THEY ASKED FOR.

Q. ALTHOUGH FISH AND WILDLIFE GAVE YOU THE APPROVAL, DID THEY STATE -

DID MR. SHAKE STATE AN OPINION IN THAT LETTER AS TO WHAT HE THOUGHT YOUR CHANCES FOR SUCCESS WERE?

A. VERY LOW.

Q. BASED UPON WHAT?

A. FISH AND WILDLIFE HAD AN EXPERIMENT WHICH DOCTOR ARNOLD WAS ALSO INVOLVED IN AT ANTIOCH DUNES WHERE THEY TRIED TO RESTORE THE BUCKWHEAT PLANTS BY GROWING THEM FIRST IN THE LABORATORY IN A GREENHOUSE SCENARIO AND THEN TRANSPLANTING THEM TO THE SITE.

[p. 376] BUT THEY FAILED TO TAKE INTO ACCOUNT ONE PROBLEM, AND THAT WAS THE NUMBER OF PEOPLE TRAMPLING OVER THE DUNES. SO BEFORE THOSE PLANTS GOT ESTABLISHED, THEY DIED. THEY WERE BENT OR PULLED OUT OF THE GROUND. SO IT WAS NOT SUCCESSFUL.

SO MR. SHAKE HEARD ABOUT THAT, AND THAT WAS THE BASIS FOR HIS CONCERN. IT'S UNFORTUNATE AT THAT TIME HE WAS NOT AWARE OF THE OTHER PROJECT THAT RICHARD ARNOLD WAS INVOLVED IN IN EL SEGUNDO WHICH WAS A TREMENDOUS SUCCESS DOING EXACTLY THE SAME THING.

Q. DID YOU CONTEMPLATE IN YOUR PLAN KEEPING PEOPLE AWARE FROM THE AREA SO THE PLANTS COULD GROW?

A. WE WERE CONCERNED WITH RESTRAINING THE DOINGS OF PEOPLE THAT LIVED IN THE DEVELOPMENT.

Q. THAT WAS TAKEN CARE OF?

A. MANAGE IN THE RESTORATION PLAN.

Q. TO WHATEVER EXTENT MR. SHAKE AT FISH AND WILD LIFE APPROVED THE RESTORATION PLAN BUT THOUGHT IT MIGHT HAVE TROUBLE SUCCEEDING, DID HE INDICATE THERE WAS ANY OTHER ALTERNATIVE HE THOUGHT MIGHT BE MORE SUCCESSFUL?

A. THAT WAS NOT HIS ROLE. HE DID NOT DO THAT, BECAUSE, OBVIOUSLY, HE WAS JUST FOLLOWING THE RESPONSIBILITIES OF THE RARE AND ENDANGERED SPECIES ACT TO SEE IF A LOSS OF THIS SITE WOULD JEOPARDIZE THE DEMISE OF THE SPECIES, AND HIS OPINION WAS IT DID NOT.

\* \* \*

[p. 399] BRIGHT-CROSS/YUHAS

Q. (BY MR. YUHAS) THE 1984 APPROVAL OF THE CONDITIONAL USE PERMIT - WE ARE SWITCHING TOPICS NOW - YOU TALKED A LITTLE ON DIRECT ABOUT THE CONDITION THAT HAD BEEN INCLUDED AS PART OF THAT APPROVAL.

PRIOR TO THE CITY'S DECISION TO APPROVE THE PROJECT, [p. 400] YOU IN FACT HAD PROPOSED A CONDITION THAT REQUIRED INPUT FROM FISH AND WILDLIFE AND FISH AND GAME AS WELL, CORRECT?

A. CORRECT.

Q. YOU DIDN'T DISAGREE IT WAS APPROPRIATE FOR THE CITY TO SEEK THAT KIND OF INPUT?

A. WE HAD HAD - NO.

Q. BECAUSE THE CITY DID NOT HAVE A BIOLOGIST OR ENTOMOLOGIST ON ITS STAFF, DID IT?

A. I'M NOT AWARE THEY DID.

Q. AND THEY ARE NOT EXPERTS ON THIS PARTICULAR BUTTERFLY?

A. I HAVE NO BASIS FOR MAKING EVALUATIONS OF THAT.

Q. AT THE TIME YOU HAD SENT OUT - AT THE TIME OF THE SEPTEMBER 1984 APPROVAL - STRIKE THAT.

AT THE TIME OF THE 1984 CONDITIONAL USE PERMIT APPROVAL, YOU HAD ALREADY DEVELOPED A RESTORATION PLAN, CORRECT?



A. YES.

Q. AND YOU HAD SENT IT OUT FOR COMMENT TO FISH AND WILDLIFE, FISH AND GAME AND OTHERS?

A. YES.

Q. AND YOU HAD GOTTEN SOME RESPONSE FROM FISH AND WILDLIFE ON THE PLAN?

A. YES.

Q. THEY DID NOT APPROVE THE PLAN AT THAT TIME?

A. NO.

[p. 401] Q. IN FACT, DOCTOR ARNOLD HAD COMMENTED ON THE PLAN AS WELL?

A. I BELIEVE SO.

Q. AND HE HAD SAID, IN HIS VIEW ANYWAY, IT HAD SOME BIOLOGICAL PROBLEMS?

A. YES.

Q. YOU SAID THAT THE SKEPTICISM THAT FISH AND WILDLIFE HAD REGARDING RESTORATION PLANS RELATED TO ONE PARTICULAR EXPERIENCE?

A. ONE AMONG MANY, BUT PRIMARILY I SAID ANTIOCH DUNES, YES.

Q. WHEN HAD THAT ATTEMPTED RESTORATION PLAN OCCURRED?

A. THAT WAS ONGOING AT THE TIME OF THE REVIEW OF THE PHILIPS SITE.

Q. AFTER THE RESTORATION PLAN WAS PREPARED, THIS JULY '84 PLAN WAS PREPARED, YOU CONTINUED TO WORK ON PUTTING TOGETHER A FINAL RESTORATION PLAN, CORRECT?

A. YES.

Q. AS PART OF THAT WORK, AM I CORRECT YOU DID SOME SURVEYS OF THE SITE IN 1985?

A. LAST OF '84 AND '85, YES.

Q. AND YOU COUNTED THE BUCKWHEAT AT THAT TIME?

A. YES.

Q. AND YOU THEN PARTICIPATED IN THE HEARING PROCESS BEFORE THE CITY COUNCIL IN MAY AND JUNE OF '86?

A. YES.

Q. IN TERMS OF WHETHER THERE WAS OR WAS NOT APPROVAL, I WANT [p. 402] TO GO OVER SOME OF THAT. STARTING WITH THE FIRST PUBLIC HEARING IN MAY, MR. JOHNSON WAS THERE, CORRECT?

A. YES.

Q. MR. JOHNSON CERTAINLY IDENTIFIED HIMSELF AS BEING FROM FISH AND GAME?

A. HE DID.

Q. HE DIDN'T SAY THAT, YOU KNOW, I'M FROM FISH AND GAME, BUT THIS IS MY OWN PERSONAL VIEW, DID HE?

A. I'M NOT SURE ABOUT THAT. MY MEMORY IS FUZZY. HE MAY HAVE SAID THAT.

Q. THERE'S NO QUESTION WHETHER HE WAS THERE AS AN INDIVIDUAL OR ON BEHALF OF FISH AND GAME, THE VIEW HE EXPRESSED WAS THAT THE RESTORATION PLAN THAT HAD BEEN PREPARED WAS NOT ADEQUATE?

A. THAT WAS HIS VIEW.

Q. IN JUNE OF '86 THERE WAS ALSO A REPRESENTATIVE OF FISH AND GAME THERE, CORRECT?

A. I BELIEVE SO.

Q. WAS THAT MR. JOHNSON AGAIN?

A. I HAVE FORGOTTEN. I BELIEVE THAT'S CORRECT, YES.

Q. BUT HE PRESENTED THE LETTER THAT YOU TALKED ABOUT ON DIRECT EXAMINATION AT THAT MEETING, CORRECT?

A. THAT'S CORRECT, YES. HE PRESENTED THE LETTER.

Q. AT THAT HEARING THE REPRESENTATIVES OF FISH AND GAME DIDN'T SAY, "DISREGARD WHAT WE SAID AT THE LAST HEARING. THIS IS REALLY NOW OUR POSITION," DID THEY?

[p. 403] A. NO, THEY DIDN'T.

Q. THEY DIDN'T IN ANY WAY SUGGEST THAT THE COMMENTS MADE BY MR. JOHNSON AT THE MAY 6 HEARING WERE SOMEHOW INAPPROPRIATE OR UNAUTHORIZED?

A. DID YOU SAY DID THEY MAKE A COMMENT?

Q. THEY DID NOT MAKE A COMMENT?

A. MR. JOHNSON DID NOT MAKE SUCH A COMMENT.

Q. AND NO ONE ELSE FROM FISH AND GAME MADE SUCH A COMMENT?

A. NO ONE ELSE FROM FISH AND GAME WAS THERE THAT I'M AWARE OF [sic].

Q. WITH RESPECT TO FISH AND WILDLIFE, THERE WAS ALSO PRESENTED AT THE HEARING A LETTER THAT SOMEONE FROM FISH AND WILDLIFE HAD PROVIDED, I BELIEVE, TO THE SIERRA CLUB?

A. THAT'S CORRECT.

Q. THAT LETTER WAS PROVIDED TO THE COUNCIL AT THE HEARING?

A. I DON'T REMEMBER PRECISELY WHETHER IT WAS PROVIDED TO THEM AT THE HEARING. I KNOW ULTIMATELY THEY DID SEE IT. IT MAY HAVE BEEN ONE OF THE THINGS AT THE HEARING. I JUST DON'T REMEMBER.

Q. I HAVE HANDED YOU WHAT HAS BEEN MARKED AS EXHIBIT 145.

DOES THAT JOG YOUR MEMORY AT ALL AS TO WHETHER THIS LETTER WAS ONE OF THE THINGS PROVIDED TO THE CITY COUNCIL?

A. DOES NOT.

Q. IT IS, ON ITS FACE, SOMETHING FROM U.S. FISH AND WILDLIFE, CORRECT?



[p. 404] A. APPEARS TO BE.

Q. IT IS SIGNED BY WILLIAM SHAKE?

A. YES.

Q. MR. SHAKE, IS HE THE SAME PERSON THAT SIGNED THE BIOLOGICAL OPINION?

A. HE IS.

Q. MR. SHAKE IS APPARENTLY RESPONDING TO AN INQUIRY FROM JOYCE STEVENS OF THE SIERRA CLUB, CORRECT?

A. THAT IS CORRECT.

Q. AND HE APPARENTLY WANTS TO CLARIFY WHAT THE STATUS OF THE BIOLOGICAL OPINION REALLY IS, IS THAT FAIR TO SAY?

A. CLARIFY.

Q. JUST READ IT.

A. I BELIEVE I STATES [sic] THE BASIS FOR THE OPINION.

Q. IF YOU WOULD LOOK AT THE SECOND PARAGRAPH. IT NOTES THAT THE CITY HAS A COPY OF THE OPINION AND:

"WE HOPE IT WILL NOT BE MISCONSTRUED AS APPROVAL OF THE PROJECT OR THE RESTORATION PLAN. OUR POSITION HAS BEEN CLEARLY STATED. THE PROJECT WILL DESTROY MOST, IF NOT ALL, OF THE SMITH'S BLUE BUTTERFLIES AND THEIR HOST PLANTS ON THE SITE AND THE FINAL RESTORATION PLAN WILL NOT LIKELY SUCCEED IN REPLACING LOST HABITAT OR

PRESERVING SMITH'S BLUE BUTTERFLIES AT THAT LOCATION."

THAT IS WHAT WAS TOLD TO THE CITY COUNCIL AT THE MAY [p. 405] HEARING AS THE MOST RECENT POSITION OF FISH AND WILDLIFE, IS THAT NOT CORRECT?

A. THIS LETTER WAS PROVIDED TO THEM. I'M ASSUMING YOU'RE CORRECT AT THAT HEARING AS AN EXPRESSION OF THE OPINION. YOU HAVE JUST READ A PARAGRAPH OUT OF THE LETTER. I THINK YOU NEED TO LOOK AT THE ENTIRE LETTER TO FIGURE OUT WHERE FISH AND WILDLIFE WAS COMING FROM.

Q. THAT IS BECAUSE THE REST OF THE LETTER EXPLAINS EXACTLY WHY IT WAS THAT FISH AND WILDLIFE HAD SAID THAT IN THEIR VIEW THIS PROJECT WOULD NOT ENDANGER THE SPECIES AS A WHOLE, CORRECT?

A. THAT IS CORRECT.

Q. IN FACT, IN THE VIEW OF FISH AND WILDLIFE, AT LEAST IN THE JURISDICTION OF FISH AND WILDLIFE, ONE COULD HAVE GONE IN THEIR [sic] WITH BULLDOZERS AND NOT HAD ANY RESTORATION PLAN WHATSOEVER?

A. THAT IS CORRECT.

Q. BUT THEY DID IN FACT, BECAUSE THEY DO HAVE, ASIDE FROM THEIR REGULATORY OBLIGATIONS, THEY HAVE AN INTEREST IN PROTECTING HABITATS WHERE POSSIBLE.

IN YOUR EXPERIENCE, ISN'T THAT TRUE?

A. CERTAINLY. THAT IS THE [sic] THROUGH THE RARE AND ENDANGERED SPECIES ACT.

Q. SO EVEN WHERE A RESTORATION PLAN IS NOT REQUIRED AS A MATTER OF FEDERAL LAW, THERE ARE CIRCUMSTANCES WHERE IT'S A [p.406] GOOD IDEA ANYWAY?

A. CERTAINLY.

Q. AND THEY IN THE EXERCISE OF THEIR BIGGER PICTURE GOAL OF PROTECTING HABITATS AND SPECIES, THEY WERE PREPARED TO COMMENT UPON THE RESTORATION PLAN IN HOPES THAT THEY COULD IMPROVE IT, FAIR TO SAY?

A. YES.

Q. I THINK YOU TESTIFIED THAT YOU VIEW THE MARCH '85 BIOLOGICAL OPINION TO BE THE APPROVAL FROM FISH AND WILDLIFE?

A. YES.

Q. YOU WERE DEPOSED IN THIS ACTION, WEREN'T YOU?

A. YES.

Q. JUST TO MAKE CLEAR, AT THAT DEPOSITION I WAS GIVEN THE CHANCE TO ASK YOU SOME QUESTIONS ABOUT THIS CASE AND YOU WERE PROVIDING ME WITH SOME ANSWERS?

A. CORRECT.

Q. AND YOU PROVIDED THOSE ANSWERS UNDER OATH?

A. CORRECT.

Q. AFTER THE DEPOSITION, YOU GOT A CHANCE TO GET THE BOOKLET BACK AND MAKE ANY CHANGES?

A. THAT'S CORRECT.

Q. AT THAT DEPOSITION - LET ME ASK YOU, IF YOU WOULD, TO TAKE A LOOK AT THE DEPOSITION AT PAGE 112, READING FROM LINE 11:

"Q. WHEN YOU GOT THE MARCH '85 LETTER THAT WE HAVE [p. 407] BEEN TALKING ABOUT, EXHIBIT 9, DID YOU VIEW THAT AS THE DEPARTMENT OFF [sic] INTERIOR'S APPROVAL OF THE RESTORATION PLAN?

A. NO. AS I POINTED OUT BEFORE, THERE WERE TWO ISSUES HERE: ONE WAS WHETHER THERE WAS A TAKING AND SIGNIFICANCE PURSUANT TO RARE AND ENDANGERED. THEY SAID 'NO.' THE SECOND WAS THEY WERE TAKING THE OPPORTUNITY IN THIS LETTER TO EXPRESS SOME OPINIONS ABOUT HOW, IF INDEED, THE PROJECT PROCEEDS, CHANGES MIGHT BE MADE."

AT THAT TIME WAS THAT QUESTION ASKED AND THAT ANSWER GIVEN.

A. YOU READ IT CORRECTLY, YES.

Q. AND IN FACT, IN THE BIOLOGICAL OPINION IN MARCH OF 1985, FISH AND WILDLIFE DID GIVE VARIOUS VIEWS AND SUGGESTIONS AS TO HOW THE RESTORATION PLAN COULD BE APPROVED?



A. INCLUDING THEIR STATEMENT IT HAD NO CHANCE OF SUCCEEDING.

Q. YOU TESTIFIED A BIT ABOUT THE MAY 1985 LETTER FROM FISH AND GAME.

A. THE ONE FROM MR. PARNELL?

Q. YES.

A. YES.

Q. IN THAT LETTER, EXHIBIT 88 - DO YOU HAVE THAT BEFORE YOU SOMEPLACE? I MAY HAVE. LET ME SEE. I DO.

IN THAT LETTER MR. PARNELL INDICATES THAT THEY AGREE [p. 408] THAT THIS PROJECT WOULD HAVE LITTLE CONSEQUENCE TO THE SMITH'S BLUE BUTTERFLY AS A WHOLE, CORRECT?

A. CORRECT.

Q. BUT ISN'T IT ALSO CORRECT THAT THE DEPARTMENT OF FISH AND GAME INDICATED IT IS NOT THE SPECIES AS A WHOLE, BUT RATHER THE POPULATION OF THE SPECIES, ANOTHER DEVELOPMENT SITE THAT REALLY IS AT ISSUE?

A. THAT WAS THEIR DETERMINATION, YES.

Q. THAT WAS THEIR VIEW?

A. YES.

Q. DIFFERENT VIEW FROM FISH AND WILD-LIFE?

A. CORRECT.

Q. IN FACT, THEY WENT ON TO NOTE THAT DOCTOR ARNOLD'S DATA AND FISH AND WILD-LIFE'S DATA INDICATES THE PROJECT COULD BE ADVERSE TO THE FUTURE POPULATIONS AT THE SITE IN SPITE OF THE SEVERAL MITIGATION EFFORTS PROPOSED IN THE REVISED PLAN?

A. YES, YOU READ IT CORRECTLY.

Q. IN FACT, HE CONCURS WITH DOCTOR ARNOLD'S FINDINGS?

A. YES.

Q. DO YOU KNOW WHAT FINDINGS HE WAS REFERRING TO THERE?

A. NO, I DO NOT. I'LL SPECULATE IT WAS THE SERIES OF COMMENTS IN THE VARIOUS LETTERS.

Q. RATHER THAN GO THROUGH ALL THE VARIOUS AND SUNDRY LETTERS FROM DOCTOR ARNOLD, IS IT FAIR TO SAY HE WAS FAIRLY STEADFAST IN HIS VIEWS THAT THE RESTORATION PLAN, THE ORIGINAL ONE AND [p. 409] AMENDED ONE, WOULD NOT BE SUCCESSFUL?

A. HE APPEARED NOT TO SUPPORT THE RESTORATION PLANS, PERIOD, AND THEREFORE DID NOT CHANGE HIS OPINION ABOUT THEM OVER TIME.

Q. DOCTOR ARNOLD, I THINK YOU MENTIONED ON DIRECT, HE WAS INVOLVED IN A RESTORATION PLAN INVOLVING THE SMITH'S BUTTERFLY, CORRECT?

A. THAT'S CORRECT.

Q. SO IN SOME CIRCUMSTANCES HE BELIEVED THAT RESTORATION PLANS COULD BE SUCCESSFUL, ISN'T THAT FAIR TO SAY?

A. I WOULD CONCLUDE THAT TO BE TRUE, BASED ON HIS PARTICIPATION AT SHAFRAN (PHONETIC), BUT NOT TRUE ON HIS COMMENTS CONCERNING PHILIPS.

Q. BECAUSE HE DISAGREED ON YOUR PROPOSALS?

A. HE DISAGREED WITH RESTORATION, PERIOD.

\* \* \*

BRIGHT-REDIRECT/JACOBSEN

[p. 423] Q. ON THE SECOND PAGE, HOWEVER, MR. SHAKE, THE HEAD OF FISH AND WILDLIFE, SAYS:

OUR OPINION ALSO SUGGESTED MODIFICATIONS TO THE PROJECT DESIGN THAT WE THINK APPROPRIATE TO PRESERVE THE BUTTERFLY IN ITS HABITAT ON THE SITE. DO YOU SEE THAT?

A. YES, I DO.

Q. "WITH THESE MODIFICATIONS, A RESTORATION PLAN ALONG THE LINES OF THAT PROPOSED COULD PROBABLY SUCCEED." CORRECT?

A. YES.

Q. DID YOU INCORPORATE THOSE SUGGESTED MODIFICATIONS FROM FISH AND WILDLIFE INTO YOUR RESTORATION PLAN?

A. YES. I QUALIFIED THAT EARLIER TODAY. IN GENERAL, WE DID THAT. THERE WERE ONE OR TWO PLACES WE COULD NOT DO IT BECAUSE OF CONFLICTING REQUIREMENTS, SUCH AS THE BERM ON THE EASTERN SIDE JUST MANDATED BY THE CITY TO CUT THAT ON THEIR VIEW IMPACTS FROM HIGHWAY 1.

Q. WHERE WAS THE BERM THAT YOU WERE REFERRING TO ON THE EASTERN SIDE? POINT IT OUT TO THE JURY.

[p. 424] A. YOU CAN SEE AN AREA RIGHT IN HERE. THIS ENTIRE AREA IN THROUGH HERE HAD TO BE BUILT UP AND A WALL, RETAINING WALL, BE PUT IN HERE STARTING AT THIS POINT AND COMING DOWN HERE TO HOLD THAT HEIGHT OF SAND SIX TO EIGHT FEET HIGH ABOVE THE GROUND LEVEL HERE (INDICATING). IT NEEDED TO BE THAT KIND OF SUPPORT, BECAUSE ANY KIND OF WIND ACTION WOULD CARRY THE SAND OVER THE TOP.

Q. WHY DID THE CITY REQUIRE AND INSIST ON THIS BERM ON THE EAST?

A. AS A MEANS OF OBSTRUCTING VIEW BY ANYBODY RIDING IN A CAR ON HIGHWAY 1.

Q. AND FISH AND WILDLIFE THOUGHT THAT THE RESTORATION PLAN WOULD HAVE A BETTER CHANCE OF SUCCESS WITHOUT THE BERM?



A. WITHOUT ANY MAN-MADE BERMS. THEY WOULD HAVE PREFERRED TO LEAVE THE BERMS THE WAY THEY WERE.

Q. DID YOU ASK THE CITY WHETHER YOU COULD ELIMINATE THIS BERM IN ORDER TO INCREASE THE CHANCE OF YOUR RESTORATION PLAN'S SUCCESS?

A. I DID NOT. MR. DAVIS DID.

Q. WHAT WAS THE CITY'S RESPONSE?

A. IT WAS ANY UNDERSTANDING THE CITY SAID NO.

Q. SO SOME OF THE MATTERS THAT WERE THOUGHT PROBLEMS WERE CITY REQUIREMENTS?

A. YES.

Q. BUT THE CITY WOULD NOT CHANGE; IS THAT CORRECT? THE CITY [p. 425] WOULD NOT CHANGE THAT?

A. WITH REGARD TO THIS VIEW VISTA BERM, IT WAS MANDATORY.

Q. MR. SHAKE ALSO REFERS TO THEY DON'T APPROVE RESTORATION PLANS. TECHNICALLY, DOES FISH AND WILDLIFE HAVE THE JURISDICTION TO APPROVE SOME LOCAL DEVELOPMENT PLAN?

A. NOT UNLESS THEY ARE THE LEAD AGENCY FOR THE PROJECT, AND THEY WERE NOT IN THIS CASE.

Q. THEY WERE A REVIEWING AGENCY?

A. THAT'S CORRECT.

Q. WHAT WAS THE BEST THEY COULD DO UNDER THEIR JURISDICTION?

A. THE SECTION 7 OPINION SAYING THAT THE LOSS OF THE HABITAT WAS NOT GOING TO JEOPARDIZE THE BUTTERFLY.

Q. THAT THEY GAVE YOU?

A. THAT'S CORRECT. AND ANY TAKING OF THE BUTTERFLY WOULD BE INCIDENTAL AND NOT SIGNIFICANT.

Q. THEY SAY IN THIS LETTER THAT THE SIERRA CLUB - THEY SAID THEIR LETTER SHOULD NOT BE MISCONSTRUED AS APPROVAL OF THE PROJECT, CORRECT?

A. THAT IS CORRECT.

Q. WERE THEY EVER ASKED TO APPROVE THE WHOLE PROJECT?

A. NO.

Q. BASED ON YOUR DISCUSSIONS WITH THEM, DID THEY LIKE THE IDEA OF BUILDING HERE?

A. THAT WAS NOT AN ISSUE OF CONCERN WITH THEM. IT NEVER CAME UP.

[p. 426] Q. LET ME TURN TO DOCTOR ARNOLD. DO YOU HAVE EXHIBIT 13 BEFORE YOU?

A. YES, I DO.

Q. THIS IS HIS LETTER WAY BACK IN 1982. DO YOU SEE UNDER - HE DOESN'T HAVE IT PAGINATED.

IT'S THE SECOND PAGE, UNDER "EVALUATION OF THE HABITAT" WAY BACK IN 82.

A. I DO.

Q. HOW DOES DOCTOR ARNOLD CHARACTERIZE THE PHILIPS SITE?

A. IT IS A DEGRADED SAND DUNE REMNANT. I NOTED ABOUT ONE-HALF OF THE CONSPICUOUS PLANT SPECIES CHARACTERISTIC OF SIMILAR DUNE REMNANTS TO THE NORTH."

Q. MR. YUHAS ASKED YOU ABOUT WHERE DOCTOR ARNOLD TALKED ABOUT THIS THING BEING A HIGHWAY OR PATHWAY. HE CHANGED HIS MIND. HOW?

A. HE ORIGINALLY THOUGHT HE WAS ON THE PHILIPS SITE, YOU REMEMBER, WHEN HE FOUND THE PARVIFOLIUM SPECIES OF BUCKWHEAT AND THE SMITH'S BLUE. HE WAS NOT. AND, THEREFORE, HIS OPINION ON THE SITE WAS NO LONGER GERMANE. HE RECOGNIZED THAT. HE TOLD US THAT HE UNDERSTOOD THAT. IT WAS ACTUALLY ADOPTED IN SOME OF THE SUBSEQUENT FISH AND WILDLIFE CORRESPONDENCE AS WELL.

Q. WOULD YOU LOOK AT PAGE 3 UNDER HIS FIRST SENTENCE RECOMMENDATIONS AND SUGGESTED MITIGATION ACTIONS?

A. I HAVE IT.

[p. 427] Q. WHAT IS HIS CONCLUSION ABOUT WHETHER THERE SHOULD BE DEVELOPMENT AT ALL ON THE SITE?

A. WELL, HE HAS AN INTERESTING ONE. IT SAYS:

"DUE TO THE SMALL SIZE OF THE SITE AND LIMITED NUMBER OF ERIOGONUM PLANTS, ANY FORM OF DEVELOPMENT IS LIKELY TO HAVE AN ADVERSE IMPACT ON THE BUTTERFLY'S LONG-TERM SURVIVAL."

Q. ANY FORM OF DEVELOPMENT?

A. YES.

Q. WAS THAT, IN GENERAL -

BASED ON YOUR DISCUSSIONS WITH HIM, HIS VIEW WAS THAT ANY FORM OF DEVELOPMENT WAS GOING TO HAVE AN ADVERSE IMPACT?

A. I THINK ANY DEVELOPMENT.

Q. HE GOES ON TO SAY:

"HOWEVER, IF NOT DEVELOPMENT OCCURS, THE SITE MAY OTHERWISE BE DAMAGED TO PRECLUDE OCCUPATION BY THE SMITH'S BLUE BUTTERFLY."

Q. LET ME REFER YOU TO THAT SECOND PARAGRAPH, AND I QUOTE:

"FOR THESE REASONS I RECOMMEND THAT IF DEVELOPMENT IS APPROVED, IT SHOULD BE LIMITED TO THE WESTERN PORTION OF THE DUNES."

DOCTOR ARNOLD, AS FAR BACK AS '82 SAYS:

"IF DEVELOPMENT IS APPROVED, IT SHOULD BE LIMITED TO [p. 428] THE WESTERN PORTION OF THE DUNES, I.E., FROM



THE LEVEL OF ABOUT SEAFOAM AVENUE TO THE OCEAN. THE AREA EAST OF SEA-FOAM SHOULD BE LEFT" -

LET ME SEE. I LOST MY PLACE. IT'S GETTING LATE IN THE DAY.

"THE AREA EAST OF SEAFOAM TO DEL MONTE BOULEVARD SHOULD BE LEFT AS A DUNE PRESERVE."

DO YOU SEE THAT STATEMENT?

A. I DO.

Q. DOCTOR ARNOLD WANTED TO REVERSE THIS, DIDN'T HE?

A. DOCTOR ARNOLD ONLY WANTED TO HAVE DEVELOPMENT TO THE WEST AND DO NO DEVELOPMENT ON THE EASTERN SIDE AT ALL. THAT IS THE SIDE RIGHT THERE. ONLY DEVELOPMENT ON THAT SIDE. NOTHING ON THE EAST AT ALL.

Q. BUT HE ALSO WANTED TO KEEP IT OUT TOWARD THE SEAWARD SIDE OF THE LAND AND LEAVE THE BACK SIDE UNDEVELOPED?

A. CORRECT.

Q. BASED ON YOUR LENGTHY CONVERSATIONS AND DISCUSSIONS AND KNOWLEDGE OF CITY OF MONTEREY POLICIES AND COASTAL COMMISSION POLICIES IN YOUR DISCUSSIONS WITH THEM, WHAT IS YOUR OPINION OF WHETHER THE COASTAL COMMISSION AND CITY OF MONTEREY WOULD HAVE ALLOWED THIS OWNER TO DEVELOP ITS CONDOMINIUM UNITS ALONG THE BEACH HERE?

A. NEVER WOULD HAVE BEEN ALLOWED.

Q. IF THE COASTAL COMMISSION AND IF THE CITY OF MONTEREY ARE [p. 429] GOING TO REQUIRE THIS OWNER TO DEVELOP LANDWARD OF THE SEWER LINE EASEMENT, IS THERE ANY WAY OF SITING THESE UNITS AND DEVELOPING IN THIS BOWL AREA TO STAY OUT OF VIEW AND ALL THOSE OTHER CONSTRAINTS YOU HAVE DESCRIBED AND STILL DO WHAT DOCTOR ARNOLD WANTS TO DO?

A. NO.

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JACK VAN ZANDER-DIRECT/JACOBSEN

[p. 463] Q. IN TERMS OF YOUR DISCUSSIONS WITH CITY OFFICIALS BEFORE THE SEPTEMBER '84 APPROVAL AND THE DOCUMENTATION YOU GAVE TO THE CITY, DID THAT SHOW THAT THIS WHOLE BOWL AREA WAS GOING TO HAVE TO BE GRADED TO CONSTRUCT THE PROJECT?

A. YES.

[p. 464] Q. DID YOU KNOW AT THE TIME IN YOUR DISCUSSIONS WITH THE CITY OFFICIALS CONCERNING THE GRADING THAT THERE WAS SOME BUCKWHEAT PLANTS IN THIS AREA AS WELL?

A. YES.

Q. BEFORE THE APPROVAL IN SEPTEMBER '84 OF THIS PUTTING UNITS IN THIS BOWL AREA AND LEAVING THE REST OF IT FOR THE BEACH AND THE

BUTTERFLIES DOWN HERE, DID ANYONE AT THE CITY SAY YOU CAN'T PUT ANY DEVELOPMENT IN HERE IF YOU'RE GOING TO BUILD OVER A BUCKWHEAT PLANT?

A. NO.

Q. DID PUBLIC WORKS KNOW THERE WERE BUCKWHEAT PLANTS YOU WERE GOING TO HAVE TO GRADE OVER?

A. I ASSUME SO. THEY WERE AT SEVERAL OF THE HEARINGS.

Q. HOW ABOUT THE PLANNING DEPARTMENT?

A. CERTAINLY.

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DANIEL CONSIDINE - DIRECT/JACOBSEN

[p. 512] Q. YOU HEARD SOME TESTIMONY CONCERNING THE EVENTS THAT LED UP TO THE SEPTEMBER '84 APPROVAL.

WAS DEL MONTE DUNES PARTNERSHIP INVOLVED IN TERMS OF MONITORING AND COMMUNICATING WITH MR. DAVIS, DOCTOR BRIGHT AND OTHERS BEFORE THIS SEPTEMBER '84 APPROVAL?

A. ABSOLUTELY. WE WERE INVOLVED IN MONITORING AS EARLY AS 1981.

Q. THEREFORE, IN SEPTEMBER OF 1984, WHEN THE CITY APPROVED THIS SITE MAP, THE PARTNERSHIP THEN DECIDED TO PURCHASE THE PROPERTY?

A. THAT'S CORRECT.

Q. AT THAT POINT, IN SEPTEMBER OF 1984, DID DEL MONTE DUNES HAVE TO PURCHASE THE PROPERTY AND PAY THESE MILLIONS OF DOLLARS?

A. NO, NOT AT ALL. IT WAS A CONDITION TO EXERCISING THE OPTION.

Q. SO DEL MONTE COULD HAVE WALKED AWAY FROM IT?

A. THAT'S CORRECT.

Q. IF DEL MONTE HAD KNOWN IN '84 THAT THE CITY OF MONTEREY, SOMETIME DOWN THE LINE, WAS GOING TO FIND THAT YOU COULDN'T BUILD THAT BECAUSE THEY WOULDN'T ALLOW YOU TO GRADE THE HOMES, WOULD DEL MONTE HAVE BOUGHT THAT PROPERTY?

A. NO, SIR.

Q. WHAT WAS DEL MONTE DUNES INVESTMENT EXPECTATION IN BUYING THIS PROPERTY AFTER THE SEPTEMBER '84 SITE PLAN APPROVAL?

[p. 513] A. WELL, THE REASON WE WAITED UNTIL THE SITE PLAN WAS APPROVED IS BECAUSE WE FELT THAT WAS THE LAST HURDLE TO DEVELOPMENT OF THE PROPERTY.

AND THE REASON FOR WAITING UNTIL THAT POINT WAS TO BE ASSURED THAT WE HAD A PIECE OF PROPERTY THAT COULD BE DEVELOPED, AND WITH THE DEVELOPMENT WE HAD A PROFIT EXPECTATION THAT WITH THE MONIES SPENT, THE



DEVELOPMENT OF THE PROPERTY ACHIEVED, HOMES BUILT AND SOLD, THE PARTNERSHIP WOULD EARN A PROFIT ON ITS INVESTMENT.

Q. AFTER YOU PURCHASED THIS PROPERTY - WHEN I SAY "YOU", I MEAN THE DEL MONTE DUNES PARTNERSHIP - PURCHASED IT IN LATE 1984 AFTER THIS SITE PLAN APPROVAL, WE'VE HEARD VARIOUS TESTIMONY BY MR. DAVIS AND DOCTOR BRIGHT AND NOW MR. VAN ZANDER ABOUT WHAT THOSE PEOPLE AND THEIR FIRMS DID AFTER THIS SITE PLAN WAS APPROVED WITH THE ARCHITECTURAL REVIEW COMMITTEE AND THE LIKE.

WHO WAS PAYING FOR THEIR SERVICES AT THAT POINT?

A. AT WHICH POINT IN TIME?

Q. AFTER THE PURCHASE OF THE PROPERTY IN LATE '84?

A. THE PARTNERSHIP WAS. THE PARTNERSHIP WAS PAYING ALL THREE OF THE FIRMS.

Q. AFTER THIS JUNE '86 DENIAL, I TAKE IT YOU WERE NOTIFIED IMMEDIATELY?

A. THAT'S CORRECT.

Q. DID YOU MAKE ANY EFFORTS, YOU MEANING THE PARTNERSHIP, TO [p. 514] SELL THIS 37.5 ACRES?

A. YES.

Q. AND WHAT EFFORTS OR STEPS DID YOU TAKE TO TRY TO SELL THIS PROPERTY?

A. AFTER THE CITY COUNCIL ACTION, WE REALLY WENT BACK TO THE DRAWING BOARDS AND TRIED TO DETERMINE WHAT, IF ANYTHING, WE COULD DO RELATIVE TO DEVELOPMENT HERE.

COMMON SENSE TOLD US THERE WAS NO WAY WE WOULD BE ABLE TO DEVELOP THIS PROPERTY. SO THE DECISION WAS MADE WE SHOULD TRY TO MITIGATE OUR LOSSES, SELL THE PROPERTY AND THEN MOVE ON TO OTHER THINGS.

IN THE PROCESS OF TRYING TO SELL THE PROPERTY, WE TALKED TO MR. DAVIS, WHO IS VERY WELL KNOWN IN THE AREA.

Q. PAUL DAVIS WHO TESTIFIED HERE?

A. YES. WE ASKED HIM FOR HIS OPINION IN MARKETING. WE ALSO TALKED WITH MERRILL LYNCH, WHO WAS AN INVESTOR IN BORG WARNER. AND MERRILL LYNCH SENT IN FROM NEW YORK A TEAM OF REAL ESTATE EXPERTS WHO IN TURN BROUGHT IN A SECOND AREA FIRM LOCATED IN MIAMI CALLED BROTHERS PROPERTY. THEY REVIEWED ALL THE MATERIAL AND DECIDED TO MARKET THE PROPERTY, AND IN FACT THEY DID MARKET THE PROPERTY.

MOST OF THE ACTIVITY THAT WAS GENERATED AS A RESULT OF OUR ACTIVITIES REALLY CAME OUT OF MONTEREY AND THAT PENINSULA AREA WHERE THIS WAS CERTAINLY VERY HIGH PROFILE, VERY VISIBLE AND EVERYBODY NEW [sic] SORT OF WHAT WAS GOING ON.

[p. 515] WE HAD A NUMBER OF DEVELOPERS CONTACT MR. DAVIS, PAUL DAVIS, AND HE WOULD RELATE FACTS TO THEM. HE IN TURN WOULD TELL THEM IF THEY ARE INTERESTED IN CONTINUING FURTHER, TO CONTACT ME.

I SPOKE WITH A NUMBER OF THE INTERESTED PARTIES. IN SOME CASE THEY WENT TO BROTHERS PROPERTY, WHICH WAS THE REAL ESTATE FIRM THAT WE WERE USING FOR MARKETING PURPOSES. I ALSO TALKED TO ITT REAL ESTATE, WHICH IS LOCATED IN CHICAGO, WHICH IS PART OF ITT CORPORATION. I TALKED TO HURON INVESTORS LOCATED IN CHICAGO, BECAUSE THEY OWN SEVERAL HOTELS IN THE MONTEREY AREA.

Q. LET ME STOP YOU THERE. AS A RESULT OF THESE EFFORTS, REGARDLESS OF WHETHER IT WAS MR. DAVIS OR MERRILL LYNCH OR WHATEVER, IS IT FAIR TO SAY YOU WERE TRYING TO MARKET THIS PROPERTY NATIONWIDE?

A. CORRECT.

Q. AS A RESULT OF THESE EFFORTS IN THE YEARS FOLLOWING THE DENIAL, WERE YOU PERSONALLY CONTACTED BY PEOPLE WITH AN INTEREST IN THE PROPERTY?

A. YES, I WAS CONTACTED.

Q. I'M REFERRING HERE TO PEOPLE FROM THE PRIVATE SECTOR, PRIVATE DEVELOPERS, WITH AN INTEREST IN THE PROPERTY?

A. YES.

Q. WHICH AT THAT POINT, FOR LACK OF A BETTER WORD, THE POINT MAN FOR THE PARTNERSHIP?

[p. 516] A. YES.

Q. SO INQUIRES FROM PEOPLE WITH INTEREST WOULD COME THROUGH YOU?

A. YES.

Q. WOULD YOU, WHEN PEOPLE CALLED, TELL THEM ABOUT THE HISTORY OF THIS PROPERTY?

A. YES.

Q. WITHOUT GOING INTO THE DETAILS OF EACH AND EVERY ONE, AFTER DISCUSSING WITH THESE PEOPLE WHO WERE INTERESTED IN THE PROPERTY, TELLING THEM THE HISTORY OF IT, WAS ANYBODY WILLING TO PURCHASE THE PROPERTY FOR MONEY?

A. NO.

Q. WHAT WERE THEY WILLING TO DO?

A. WELL, THE TYPICAL PERSON COMING FORWARD WAS SOMEONE WHO WANTED US TO GIVE THEM AN OPTION ON THE PROPERTY FOR SOME PROLONGED PERIOD OF TIME SO THEY COULD EVALUATE WHAT THEY MIGHT DO WITH THE PROPERTY. THESE PEOPLE WERE NOT PREPARED TO ENTER INTO A CONTRACT FOR PURCHASE OF THE PROPERTY.

WHAT THEY WERE LOOKING FOR WAS A LONG-TERM OPTION, BECAUSE FRANKLY THEY HAD - THE



INFORMATION AND HISTORY AS RELATED HERE, AND ALTHOUGH IT'S A WONDERFUL PIECE OF PROPERTY, THERE WAS OBVIOUSLY A BIG CONCERN IN EVERYBODY'S MIND AS WHETHER IT COULD EVER BE DEVELOPED.

Q. WHOEVER HAD INTEREST FROM THE PRIVATE SECTOR, WAS ANYBODY EVER WILLING TO PUT UP ANY CASH UNCONDITIONALLY?

[p. 517] A. NO. EVERY OFFER, AND WE RECEIVED A NUMBER OF WRITTEN OFFERS, THEY WERE ALWAYS OPTIONS, NEVER ANY CASH INVOLVED, AND SOME POINT IN THE FUTURE, AND THAT POINT IN THE FUTURE WAS NORMALLY CITY APPROVAL OF THE PROJECT.

Q. AT SOME -

A. SOME DISTANT POINT. IN SOME CASES THE OPTIONS WOULD BE FOR SIX OR NINE MONTHS, BUT THEY WERE RENEWABLE THREE OR FOUR TIMES.

Q. ALSO AFTER THE DENIAL, DID ANYONE FROM A GOVERNMENT AGENCY CONTACT YOU ABOUT THIS PROPERTY?

A. IN 1988 I RECEIVED A LETTER FROM STATE OF CALIFORNIA COASTAL CONSERVANCY ADVISING ME THAT THEY HAD SOME INTEREST IN THE PROPERTY AND ASKING ME IF WE WERE INTERESTED IN SELLING THE PROPERTY.

Q. EITHER AT THAT TIME OR SOME LATER TIME IN YOUR DISCUSSING WITH THE STATE OF CALIFORNIA, WHAT DID THEY WANT IT FOR? DID THEY WANT TO DEVELOP IT?

A. NO. THEY WANTED TO USE IT AS A PARK.

Q. THE ENTIRE PROPERTY?

A. ENTIRE PARCEL.

Q. DID YOU ULTIMATELY SELL THE PROPERTY TO THE STATE OF CALIFORNIA?

A. YES, WE DID. WE SOLD ALL BUT A SMALL PORTION THAT CURRENTLY IS UNDER OPTION TO THE STATE WHICH WE BELIEVE WILL EVENTUALLY BE SOLD TO THEM.

\* \* \*

[p. 520] Q. OF THIS PURCHASE PRICE OF FOUR AND A HALF MILLION DOLLARS, WAS THAT NEGOTIATED WITH THE STATE?

A. IT WAS VERY DIFFICULT TO NEGOTIATE WITH THE STATE BECAUSE THEY WERE VERY ADAMANT. THEY SAID WE CAN'T PAY ANY MORE THAN APPRAISED VALUE.

Q. WHOSE?

A. THEIRS. THEY WOULD SEND OUT THEIR APPRAISER WHO WOULD DO AN EVALUATION OF THE PROPERTY, AND THAT WOULD DETERMINE WHAT THE PURCHASE PRICE WAS.

Q. THEN WAS A TAKE IT OR LEAVE IT PROPOSITION?

A. YES.

Q. IN YOUR DISCUSSIONS WITH THESE STATE REPRESENTATIVES, WERE YOU MADE KNOWN THAT THE STATE OF CALIFORNIA HAD THE POWER OF CONDEMNATION?

A. YES.

Q. DID THEY MAKE YOU AWARE OF WHAT USE THEY WANTED FOR THE PROPERTY?

A. YES, THEY DID.

Q. WHAT USE WAS THAT?

A. IT WAS OPEN LANDS. IT WAS GOING TO BE A PARK, JUST A GREAT, BIG EMPTY LOT, A PARK.

Q. ON AN ARM'S LENGTH TRANSACTION WITH A PRIVATE DEVELOPER COMING IN TO BUY THIS, WOULD YOU HAVE SOLD IT FOR FOUR AND A HALF MILLION DOLLARS?

[p. 521] A. NO, NOT AT ALL.

Q. AT THE TIME YOU WERE TALKING TO THE STATE OF CALIFORNIA REPRESENTATIVES, WERE THERE - WHO WAS GOING TO BE PAYING THE MONEY TO ACQUIRE THIS PROPERTY FOR THE GOVERNMENT?

A. WELL, ACCORDING TO THE CONSERVANCY, BECAUSE I DID ASK THAT QUESTION BECAUSE IT WAS RELEVANT TO US -

MR. YUHAS: YOUR HONOR, I OBJECT. IT'S HEARSAY.

THE COURT: SOUNDS LIKE IT. I WILL SUSTAIN THE OBJECTION.

Q. (BY MR. JACOBSEN) WAS IT CONTEMPLATED THERE BE VARIOUS GOVERNMENTAL AGENCIES CONTRIBUTING TO THE PURCHASE PRICE OF FOUR AND A HALF MILLION?

A. YES.

MR. YUHAS: OBJECTION. HEARSAY.

THE COURT: SOUNDS TO ME LIKE THE SAME QUESTION. SUSTAINED.

Q. (BY MR. JACOBSEN) DID IT COME TO YOUR ATTENTION THE CITY OF MONTEREY WAS GOING TO CONTRIBUTE TO THE PURCHASE PRICE OF THIS FOR A PARK?

A. YES.

Q. HOW DID IT COME TO YOUR ATTENTION?

A. CAME TO ME THROUGH TWO SOURCES.

MR. YUHAS: I OBJECT, YOUR HONOR, AS TO ONE BUT NOT THE OTHER.

THE COURT: DO YOU UNDERSTAND WHICH ONE HE IS [p. 522] TALKING ABOUT?

THE WITNESS: YES. I RECEIVED A CALL FROM BILL CONNORS, WHO IDENTIFIED HIMSELF AS AN ATTORNEY IN THE CORPORATE COUNSEL'S OFFICE IN THE CITY OF MONTEREY. AND HE ADVISED ME THAT THE CITY WAS GOING TO BE



MAKING A CONTRIBUTION TOWARDS THE PURCHASE OF THE PARCEL AND THAT HE WAS CONCERNED ABOUT THAT BECAUSE IN OUR LAWSUIT AGAINST THE CITY, WE HAD ALLEGED THAT THE CITY WITHHELD ZONING BECAUSE THEY WANTED THIS TO REMAIN A PARK, UPLANDS AND THAT THEIR CONTRIBUTION COULD BE SEEN AS DAMAGING INFORMATION IN THE LAWSUIT.

AND HE ASKED ME SPECIFICALLY AND SAID HOW CAN WE POSSIBLY MAKE A CONTRIBUTION TOWARDS THE PURCHASE PRICE UNDER THOSE CIRCUMSTANCES? I TOLD HIM, FRANKLY, I DIDN'T KNOW. AND THAT WAS, FRANKLY, ABOUT THE EXTENT OF OUR CONVERSATION TO SUMMARIZE. BUT IT'S FACTUAL.

Q. WAS THIS PERSON AN EMPLOYEE EMPLOYED BY THE CITY OF MONTEREY?

A. THAT IS THE WAY HE IDENTIFIED HIMSELF AN ATTORNEY WORKING FOR THE CORPORATE COUNSEL'S OFFICE FOR THE CITY OF MONTEREY.

Q. DID THIS CONVERSATION OCCUR AFTER YOU HAD ENTERED INTO THE OPTION WITH THE STATE OF CALIFORNIA?

A. YES.

Q. DID MR. CONNORS IN THIS CONVERSATION TELL YOU ANYTHING TO THE EFFECT OF BEFORE YOU SELL IT OR RECONSIDER, DON'T SELL IT [p. 523] TO THE STATE BECAUSE, AFTER ALL, IF YOU COME BACK IN, WE'LL GIVE YOU DEVELOPMENT ON THIS LAND?

THE COURT: SORRY. IF THAT IS A QUESTION, I DON'T UNDERSTAND.

MR. JACOBSEN: VERY WELL. I WILL REPHRASE IT.

Q. WE HEARD MR. DAVIS TESTIFY ABOUT NOT RESUBMITTING APPLICATIONS AFTER THIS DENIAL. OTHERS TALKED ABOUT HOW IT COULDN'T BE DONE.

AT THE TIME THAT THIS CITY EMPLOYEE, WHO WAS AN ATTORNEY FOR THE CITY, CALLED YOU IN THE MIDDLE OF YOUR NEGOTIATIONS WITH THE STATE, DID HE AT ANY TIME SAY DON'T SELL TO THE STATE BECAUSE YOU CAN COME BACK AND GET SOME DEVELOPMENT APPROVALS FOR THIS PROPERTY?

A. NO, HE NEVER SUGGESTED THAT.

Q. DID HE OR ANYONE ELSE DURING THIS PERIOD OF TIME YOU WERE NEGOTIATING GO WITH THE STATE OF CALIFORNIA FOR THE SALE OF THE PROPERTY FOR PARK PURPOSES CONTACT YOU AND DISCOURAGE YOU FROM SELLING TO THE STATE OF CALIFORNIA?

A. NO.

Q. DID ANYONE FROM THE CITY OF MONTEREY, THIS ATTORNEY OR ANYONE ELSE, DURING THE TIME PERIOD YOU ARE TALKING TO THE STATE OF CALIFORNIA TO SELL THE PROPERTY FOR PARK PURPOSES, DID ANYONE CONTACT YOU AND INVITE YOU OR ADVISE YOU TO COME BACK WITH

ANOTHER DEVELOPMENT PROPOSAL INSTEAD OF SELLING TO THE STATE?

[p. 524] A. NO.

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FLOYD CLEVINGER - DIRECT/JACOBSEN

[p. 709] Q. IN LATE 1991, IF IN FACT YOUR HIGHEST AND BEST USE HAD BEEN RESIDENTIAL MULTI-FAMILY, AS YOU HAD IN THE BEFORE CONDITION, WHAT WOULD THIS PROPERTY HAVE BEEN WORTH IN YOUR OPINION?

A. I THINK IT WOULD HAVE BEEN WORTH AROUND NINE OR \$10 PER SQUARE FOOT.

Q. HOW MUCH WOULD THAT HAVE TRANSLATED TO TOTAL?

A. OH, NINE OR \$10 MILLION.

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WILLIAM WOJTKOWSKI - DIRECT/YUHAS

[p. 805] SO COULD YOU JUST DESCRIBE BRIEFLY THE RELATIVE POSITIONS OF THE CITY AND THE COASTAL COMMISSION STAFF REGARDING THE ACCESS ISSUE AT THIS TIME?

A. IN SPRING OF '84?

Q. YES.

A. THE CITY, AS I MENTIONED, HAD REQUIRED AN ENVIRONMENTAL IMPACT REPORT DONE FOR

THIS PHILLIPS PETROLEUM PROJECT. IN THAT ENVIRONMENTAL IMPACT REPORT THERE IS A TRAFFIC ANALYSIS.

THERE WAS A LOT OF TESTIMONY. FOR THAT REASON, AND A VARIETY OF OTHER REASONS, THE CITY FELT THAT THE BEST ACCESS WOULD BE FROM DEL MONTE AVENUE. THAT WOULD BE THE PRIMARY ACCESS.

SINCE THE SECONDARY ACCESS WAS NEEDED FOR THIS PROJECT AND ALSO DESIRABLE FOR THE EXISTING DEVELOPMENT, THERE WAS AN EMERGENCY ACCESS THAT WAS NEEDED.

WE LOOKED AT OTHER POSSIBILITIES. AND TO THE RIGHT WAS THE STATE PROPERTY. AND THE STATE WAS GOING THROUGH THEIR [p. 806] OWN MASTER PLANNING, AND THEY - AT THAT TIME THEY WERE NOT TOO RECEPTIVE TO HAVING ACCESS THROUGH THEIR PROPERTY.

TO THE NORTH WAS THE WATER. THERE WAS NO POSSIBLE WAY OF GOING TO THE NORTH.

AND SO IF ONE ACCESS WAS TO THE SOUTH, WE FELT THAT THE ONLY OTHER POSSIBLE WAY WAS TO THE WEST. WE LOOKED AT VARIOUS ALTERNATIVES THROUGH THAT EXISTING SUBDIVISION, PUBLIC WORKS DEPARTMENT, FIRE DEPARTMENT - I REMEMBER LOOKING AT THESE OTHER STREETS, DOWN CREST AND SEAFOAM. AND IT WAS FELT THAT THE MOST FEASIBLE ACCESS WAS THROUGH TIDE AVENUE.



THERE WAS A PLAN ALREADY ON THE AVENUE, WHICH INDICATED THE CITY SOMETIME PREVIOUSLY, I THINK IN THE SIXTIES, HAD INDICATED THAT THAT WOULD BE - THAT WOULD BE EITHER A PRIMARY ROAD OR AN EMERGENCY ROAD.

Q. WHAT WAS THE COASTAL COMMISSION POSITION ON THE ACCESS ISSUE?

A. THE COASTAL COMMISSION WAS SAYING ALMOST JUST THE REVERSE OF US. THEY WERE SAYING THAT THE PRIMARY ACCESS SHOULD BE THROUGH TIDE AVENUE. AND IF THAT DIDN'T WORK, THE SECONDARY ACCESS SHOULD BE THROUGH THE STATE PROPERTY.

I'M SORRY. THE PRIMARY ACCESS SHOULD BE THROUGH TIDE AVENUE. IF THAT DIDN'T WORK, THE PRIMARY ACCESS SHOULD THEN BE THROUGH THE STATE PROPERTY.

IF ALL ELSE FAILS, AND THERE IS A REAL GOOD ACCESS ANALYSIS, THEN, AND ONLY THEN, WOULD YOU COME THROUGH ON DEL [p. 807] MONTE.

IT IS MY UNDERSTANDING THAT WAS BASED BECAUSE THEY WERE CONCERNED ABOUT THIS HABITAT, THAT A PUBLIC ROAD WOULD IMPACT THAT HABITAT THAT WAS IN THAT AREA.

Q. NOW, DID THE CITY ENGAGE IN SOME EFFORT TO TRY TO CONVINCE THE COASTAL COMMISSION THAT THE ACCESS PROPOSAL FAVORED BY THE CITY SHOULD BE APPROVED BY THE COMMISSION?

A. YES.

Q. CAN YOU DESCRIBE THOSE EFFORTS, PLEASE.

A. WE, AGAIN, STAFF INVITED THE COASTAL COMMISSION STAFF TO COME DOWN THERE AND TO LOOK AT THESE VARIOUS ALTERNATES. AND, UNDERSTAND, WE NEEDED TWO MEANS OF ACCESS, AND THERE WERE ONLY FOUR POSSIBLE MEANS OF ACCESS. ONE OF THEM WAS THE WATER. SO THERE ARE REALLY ONLY THREE POSSIBLE MEANS OF ACCESS.

AND THAT TO THE RIGHT WAS THE STATE PROPERTY, AND THEY WEREN'T ALLOWING US. SO WE ONLY HAD AT THAT TIME, WE THOUGHT, TWO VIABLE MEANS OF ACCESS.

WE WALKED THROUGH THE SITE WITH THEM. WE GAVE THEM - PREPARED A DOCUMENT OF ALL OF OUR VARIOUS DEPARTMENT ANALYSIS, AS WELL AS THE PREVIOUS TRAFFIC ANALYSIS, TO TRY TO SUBSTANTIATE THAT.

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[p. 820] Q. WHAT ACCESS ROUTES WERE BEING PROPOSED AS PART OF THE 190-UNIT PROPOSAL?

A. THEY WERE THE SAME ACCESS ROUTES THAT WERE CONTAINED IN THE CITY'S LAND USE PLAN, AND THAT IS THE PRIMARY ACCESS WOULD BE SOUTH TO DEL MONTE AVENUE, AND THEN THERE WOULD BE A SECONDARY, AN EMERGENCY ACCESS, THROUGH TIDE AVENUE. THAT EMERGENCY ACCESS WOULD BE GATED OFF. IT WOULD

NOT BE USED ON A REGULAR BASIS; ONLY IF THERE WAS SOME KIND OF CATASTROPHE.

Q. THERE HAS BEEN TESTIMONY ABOUT THIS, BUT JUST SO WE ARE CLEAR, FOR THE DEVELOPER TO REACH THAT SECONDARY ACCESS, WOULD IT HAVE BEEN NECESSARY TO ACQUIRE PROPERTY FROM THE NEXT DOOR NEIGHBOR?

A. IT WOULD BE NECESSARY TO EITHER ACQUIRE THE PROPERTY, OR YOU CAN ACQUIRE SOMETHING CALLED AN EASEMENT, WHICH MEANS THAT THE OWNERSHIP STILL STAYS WITH THE PRESENT OWNER, BUT HE [p. 821] ALLOWS YOU THE RIGHT TO CROSS HIS PROPERTY. SO YOU WOULD EITHER HAVE TO ACQUIRE THE PROPERTY OR AN EASEMENT.

Q. NOW, IN THE COURSE AND EVOLUTION OF THIS 190-UNIT DEVELOPMENT PLAN PREVIOUSLY, HAD YOU HAD ANY DISCUSSIONS WITH ANYBODY REPRESENTING THE DEVELOPER CONCERNING HOW THIS EASEMENT OR ACCESSWAY WOULD BE ACQUIRED?

A. THE ACCESSWAY ON TIDE AVENUE?

Q. YES.

A. NO. I HAD NOT.

Q. ARE YOU AWARE OF ANYONE AT THE CITY TELLING THE PLAINTIFF THAT THE CITY WOULD CONDEMN THAT ACCESSWAY, IF NECESSARY, PRIOR TO THE JANUARY OR THE SEPTEMBER '84 HEARING?

A. NO, I WAS NOT AWARE OF THE TYPE OF DISCUSSION OF THAT EFFECT.

Q. AT THE HEARING BEFORE THE CITY COUNCIL, WERE THERE ANY DISCUSSIONS OR MENTIONS OF THE POSSIBILITY THAT THE CITY MIGHT OR WOULD CONDEMN THIS PROPERTY?

A. NO, NO DISCUSSIONS AT ALL ABOUT THAT ISSUE.

Q. HOW WAS IT THAT STAFF EXPECTED THAT THE DEVELOPER WOULD BE ABLE TO ACQUIRE THIS ACCESSWAY?

A. SIMPLY BY OFFERING - NEGOTIATING AND OFFERING MONEY TO THE PROPERTY OWNER. AND AGAIN, HE COULD EITHER OFFER TO BUY THE PROPERTY OUTRIGHT OR JUST AN EASEMENT.

Q. NOW, AT THE TIME THE CITY COUNCIL WAS CONSIDERING THE SEPTEMBER SITE PLAN, WAS THE CITY COUNCIL ASKED TO APPROVE THE [p. 822] HABITAT PROTECTION MEASURES?

A. NO, IT WAS NOT.

Q. WHY NOT?

A. WELL, THERE WAS ONLY A DRAFT HABITAT PLAN AND ALSO - THAT WAS BEING CIRCULATED TO VARIOUS EXPERTS TO VIEW. IT WAS REALLY IN A DRAFT TYPE OF STAGE. IT WAS NOT A FINAL RESTORATION PLAN.

Q. WAS THE RESTORATION PLAN THAT WAS RECEIVED, WAS THAT PREPARED BY DOCTOR BRIGHT?



A. I BELIEVE IT IS, YES.

Q. YOU SAID IT WAS BEING REVIEWED BY EXPERTS.

CAN YOU BE MORE SPECIFIC AS TO WHO WAS BEING ASKED TO REVIEW THIS RESTORATION PLAN?

A. IT WAS AT LEAST BEING REVIEWED BY FISH AND GAME, WHICH IS A STATE AGENCY, FISH AND WILDLIFE, WHICH IS A FEDERAL AGENCY, AND I BELIEVE WE ALSO SENT A COPY OF IT TO DOCTOR ARNOLD. DOCTOR ARNOLD WAS INVOLVED IN THE DRAFT EIR.

Q. BETWEEN THE TIME -

DO YOU RECALL WHEN THIS RESTORATION PLAN WAS FIRST AVAILABLE FOR CIRCULATION?

A. NOT PRECISELY. I WOULD THINK THE SUMMER OF 1984, BUT I'M NOT POSITIVE.

Q. DID THE CITY OBTAIN AT LEAST SOME TYPE OF PRELIMINARY INPUT FROM FISH AND WILDLIFE PRIOR TO THE SEPTEMBER HEARING ON THE 190-UNIT PROPOSAL?

[p. 823] A. I DON'T RECALL SPECIFICALLY. I THINK THERE WAS SOME DISCUSSION. A LOT OF THAT EARLY STAGE WAS BEING HANDLED BY OUR - MY PLANNER, HAYWARD NORTON.

Q. I HAVE HANDED YOU WHAT HAS BEEN MARK [sic] AS EXHIBIT 64 RECEIVED IN EVIDENCE IN THIS CASE.

THIS IS A LETTER DATED AUGUST 22, 1984 FROM THE FISH AND WILDLIFE SERVICE?

A. THAT'S CORRECT.

Q. IF YOU WOULD LOOK ON THE SECOND PAGE, DOES THIS LETTER PROVIDE AT LEAST SOME PRELIMINARY COMMENTS ON THE RESTORATION PLAN THAT HAD BEEN SENT TO FISH AND WILDLIFE FOR REVIEW?

A. YES, IT DOES.

Q. IN THE PARAGRAPH AT THE TOP, WOULD YOU PLEASE READ THAT PARAGRAPH FOR THE JURY?

A. "IN REGARD TO THE GENERAL GOALS LISTED ON PAGES 2 AND 3 OF THE RESTORATION PLAN -"

Q. READ MORE SLOWLY.

A. YES.

"IN REGARD TO THE GENERAL GOALS LISTED ON PAGES 2 AND 3 OF THE RESTORATION PLAN, WE SUPPORT THOSE THAT ELIMINATE THE EXOTIC ICE PLANTS AND THOSE THAT PROVIDE POTENTIAL HABITAT AREAS FOR THE SMITH'S BLUE BUTTERFLY. WE DO NOT NECESSARILY AGREE WITH THE PLANS TO ACHIEVE THE GOALS, ESPECIALLY THOSE INVOLVING THE REMOVAL AND REPLACEMENT OF SAND AND [p. 824] THOSE THAT CONTROL THE NATURAL MOVEMENT OF SAND. WE CAN ALSO SUPPORT THE PLAN TO PROHIBIT OFF-ROAD VEHICLES IN THE AREA TO PROTECT THE SMITH'S BLUE BUTTERFLY AND ITS FOOD

PLANT. PLANS RELATING TO RELOCATING PLANTS SUCH AS," AND I WILL SPELL THIS, E-R-I-O-G-O-N-U-M, AND THEN IT HAS "SPP. HAVE LITTLE LIKELIHOOD FOR SUCCESS."

Q. DO YOU RECALL WHETHER THE CITY HAD ALSO -

THE COURT: WHAT EXHIBIT WAS THAT?

MR. YUHAS: EXHIBIT 64.

Q. DO YOU RECALL WHETHER PRIOR TO THE CITY COUNCIL'S CONSIDERATION OF THE 190-UNIT PROPOSAL THAT IT HAD RECEIVED INPUT FROM DOCTOR ARNOLD?

A. YES, I BELIEVE THERE WAS A LETTER SENT BY DOCTOR ARNOLD TO THE CITY.

Q. WITHOUT GOING INTO THE SPECIFICS, DO YOU RECALL WHETHER DOCTOR ARNOLD WAS FAVORABLY OR DISFAVORABLY DISPOSED TOWARD THE RESTORATION PLAN?

A. I BELIEVE DOCTOR ARNOLD'S LETTER RAISED SOME CONCERNS ABOUT THE ADVERSE IMPACTS OF THE RESTORATION PLAN.

Q. DID THE CITY GIVE DOCTOR BRIGHT THE OPPORTUNITY TO RESPOND TO THESE COMMENTS?

A. YES. ANY LETTERS OF THIS TYPE THAT WE WOULD RECEIVE WE WOULD SEND THEM TO PAUL DAVIS AND DOCTOR BRIGHT.

Q. AS OF THE TIME THAT THE CITY COUNCIL WAS CONSIDERING THE [p. 825] 190-UNIT PROPOSAL, DID STAFF CONSIDER THAT FISH AND WILDLIFE HAD AT THAT TIME APPROVED THE RESTORATION PLAN?

A. NO WAY HAD THEY APPROVED IT.

Q. HOW WAS THE ISSUE OF HABITAT PROTECTION TO BE ADDRESSED IN THE CONTEXT OF THE SITE PLAN ISSUES FACING THE CITY COUNCIL?

A. STAFF HAD PROPOSED A CONDITION IN THE WRITTEN STAFF REPORT TO THE COUNSEL THAT - AND I'M NOT SURE OF THE PRECISE WORDING, BUT I THINK IT SAID PRIOR TO THE FINAL MAP THAT THIS PLAN, RESTORATION PLAN, BE REMOVED AND APPROVED BY AT LEAST TWO AGENCIES, FISH AND GAME, FISH AND WILDLIFE, AS WELL AS THE CITY OF MONTEREY.

Q. WAS THIS PROPOSED CONDITION MADE KNOWN TO THE DEVELOPER?

A. YES.

Q. HOW WAS IT MADE KNOWN TO THE DEVELOPER?

A. AGAIN, WE TRANSMIT ALL THESE WRITTEN STAFF REPORTS THAT WE SENT TO THE CITY COUNCIL, ALWAYS SEND A COPY TO THE APPLICANT AND ANY OTHER AFFECTED PARTIES.

Q. WHY WAS IT THE CITY WAS SEEKING INPUT FROM FISH AND WILDLIFE ON THE RESTORATION PLAN?



A. THERE WAS NOT THAT LEVEL OF EXPERTISE EITHER AT THE STAFF OR PLANNING COMMISSION OR CITY COUNCIL LEVEL TO COMPLETELY EVALUATE THIS TYPE OF SCIENTIFIC ISSUE.

Q. IN THE CONTEXT OF THE DEL MONTE BEACH LAND USE PLAN, DID FISH AND WILDLIFE HAVE A ROLE UNDER THAT PLAN IN THE EVALUATION OF RESTORATION PLANS?

[p. 826] A. YES. BOTH, I THINK, FISH AND WILDLIFE AND FISH AND GAME, THE COASTAL COMMISSION AND THE CITY CONCURRED THAT THEY WOULD BE INVOLVED WITH THE REVIEW, AND I THINK THEIR WORDING WAS "REVIEW AND CONCUR WITH ANY HABITAT RESTORATION PLAN."

Q. DID THE CITY ALSO INCLUDE IN ITS CONDITION REVIEW BY THE DEPARTMENT OF FISH AND GAME?

A. YES, IT DID.

Q. DID THE DEVELOPER - AT THIS TIME THE DEVELOPER WAS PONDEROSA?

A. YES.

Q. DID ANYONE AT PONDEROSA OBJECT TO INCLUDING AS PART OF THE SITE PLAN APPLICATION THIS TYPE OF CONDITION?

A. NO, THEY DID NOT.

Q. DID DOCTOR BRIGHT EXPRESS ANY VIEWS AS TO WHETHER IT WAS APPROPRIATE TO SEEK INPUT AND APPROVAL FROM U.S. FISH AND WILDLIFE AND FISH AND GAME?

A. YES. I BELIEVE HE SUPPORTED THAT TYPE OF REVIEW.

Q. MR. WOJTKOWSKI, I HAVE HANDED YOU WHAT HAS BEEN MARKED AS EXHIBIT 6. IF YOU WOULD TAKE A MOMENT TO LOOK AT THAT AND TELL THE JURY WHAT THIS IS.

A. THIS IS A LETTER FROM DOCTOR BRIGHT TO BILL FELL, MEMBER OF MY STAFF, DATED AUGUST 9, 1984, REGARDING CORRESPONDENCE ON RESTORATION PLAN.

Q. I ASKED YOU EARLIER WHETHER DOCTOR BRIGHT HAD HAD THE OPPORTUNITY TO RESPOND TO FISH AND WILDLIFE AND DOCTOR ARNOLD.

[p. 827] IS THIS HIS RESPONSE TO THEIR COMMENTS?

A. YES. FIRST SENTENCE SAYS THAT, THAT HE HAS REVIEWED THE CORRESPONDENCE FROM DOCTOR ARNOLD AND FROM FISH AND WILDLIFE.

Q. IF YOU WOULD LOOK ON PAGE 4 OF THIS EXHIBIT AT THE BOTTOM.

DOES DOCTOR BRIGHT AT THAT POINT SUGGEST THAT A CONDITION BE ADDED TO THE SITE PLAN APPROVAL?

A. YES, HE DOES.

Q. DOES HIS PROPOSAL ALSO INCLUDE REVIEW OF THE RESTORATION PLAN BY FISH AND WILDLIFE AND FISH AND GAME?

A. I SEE FISH AND WILDLIFE - YES. ACTUALLY, IT SAYS:

"NECESSARY PERMIT FROM FISH AND WILDLIFE AND SAID RESTORATION PLAN SHALL INCLUDE RESOLUTIONS OF THE CONCERNS OF THE DEPARTMENT OF FISH AND GAME AND DEPARTMENT OF PARKS AND RECREATION AND THE CALIFORNIA COASTAL COMMISSION."

Q. THIS MAY BE OBVIOUS, BUT JUST SO IT IS CLEAR, WHAT WAS THE PURPOSE OF INCLUDING THIS HABITAT PROTECTION CONDITION AS PART OF THE SITE PLAN APPROVAL PROCESS?

A. WELL, WE DID NOT KNOW THE COMPLETE SCOPE OF THIS RESTORATION PLAN, AND IT MAY IMPACT THE SITE PLAN AND REQUIRE SOME CHANGES. AND THE REASON FOR THE SPECIFIC CONDITION, AGAIN, IS THAT THE CITY DID NOT HAVE THE EXPERTISE TO REVIEW IT. SO WE ASKED THAT OUTSIDE AGENCIES, STATE AND FEDERAL AGENCIES, REVIEW AND APPROVE IT, AS WELL AS THE CITY OF MONTEREY.

[p. 828] Q. AT THE TIME THAT THE SITE PLAN WAS BEING CONSIDERED BY THE CITY, AND BY THE SITE PLAN I MEAN THE 190-UNIT SITE PLAN PROPOSED BY THE APPLICANT, WAS IT KNOWN WHETHER THIS HABITAT PROTECTION CONDITION COULD BE SATISFIED IN THE CONTEXT OF THAT SPECIFIC SITE PLAN?

A. NO, IT WAS NOT FULLY KNOWN. IT WAS HOPED THAT IT COULD BE.

I DO RECALL THAT THE CITY STAFF MADE SOME SUGGESTIONS ON THE CIRCULATION PATTERN THAT REDUCED SOME OF THE IMPACTS OF INCOMING ROADS AND PROTECTED MORE OF THE HABITAT. AND THE APPLICANT AGREED WITH THAT. SO IT WAS HOPED. BUT NO, IT WAS NOT KNOWN. THAT'S WHY WE PUT THAT CONDITION OF APPROVAL.

Q. WAS THE POSSIBILITY RAISED THAT MEETING THAT CONDITION MIGHT REQUIRE THAT THE SITE PLAN BE MODIFIED IN SOME RESPECT?

A. YES, IT WAS.

Q. HOW WAS THAT MADE KNOWN TO THE APPLICANT?

A. I THINK ACTUALLY IT WAS PART OF THE WORDING OF THE DRAFT STAFF CONDITION IN THE REPORT THAT THIS MAY RESULT IN CHANGES TO THE SITE PLAN.

Q. DID THE CONDITION ALSO INDICATE WHAT WOULD HAPPEN TO HE - WHAT WOULD HAVE TO HAPPEN THEREAFTER IF IN FACT CHANGES TO THE SITE PLAN WERE REQUIRED?

A. THEN THE SITE PLAN WOULD HAVE TO GO BACK THROUGH THE REVIEW PROCESS.

[p. 829] Q. AGAIN, WAS THE DEVELOPER AWARE OF THAT POSSIBILITY?

A. YES, HE WAS.

Q. AGAIN, HOW WAS HE AWARE OF THAT?



A. HE RECEIVED THE REPORT IN WRITING AHEAD OF THE MEETING.

\* \* \*

[p. 830] Q. THE HEARING ON THIS 190-UNIT SITE, THAT WAS ON SEPTEMBER 13, 1984?

A. I BELIEVE IT WAS SEPTEMBER 13.

Q. THIS WAS A PUBLIC HEARING?

A. THAT'S CORRECT.

Q. WHO MADE THE PRESENTATION FROM THE CITY STAFF PERSPECTIVE TO THE CITY COUNCIL AT THAT PUBLIC HEARING?

A. I DID.

Q. IN THE COURSE OF YOUR PRESENTATION, DID YOU DISCUSS THE HABITAT CONDITION AND HOW IT FIT INTO THE OVERALL PROCESS?

A. THAT'S CORRECT. I REMEMBER COUNCIL MEMBERS ASKING WAS THE HABITAT PLAN APPROVED, AND I REMEMBER RESPONDING NO, IT WAS NOT, BUT IT'S COVERED BY THIS CONDITION OF APPROVAL.

Q. WAS THERE A DISCUSSION AS TO WHAT MIGHT HAPPEN IF IN ORDER TO SATISFY THE HABITAT CONDITION THE SITE PLAN MIGHT HAVE TO BE MODIFIED?

A. YES. THERE WAS SOME DISCUSSION THAT IF IT RESULTED IN CHANGES TO THE SITE PLAN, THEN THE SITE PLAN WOULD HAVE TO GO [p. 831] BACK AND BE REVIEWED BY THE CITY.

Q. WAS THERE ANY DISCUSSION IN THE COURSE OF THE CITY COUNCIL DELIBERATIONS CONCERNING HOW THE HABITAT CONDITION SHOULD BE ADDRESSED IN FUTURE CONSIDERATION OF THIS DEVELOPMENT?

A. YES, THERE WAS. THERE WAS SOME DISCUSSION THAT SINCE THIS MIGHT CHANGE THE SITE PLAN OR HAD A POSSIBILITY OF CHANGING THE SITE PLAN, RATHER THAN REQUIRING IT AT THE FINAL MAP THAT THAT - I THINK IT WAS CONDITION NUMBER 3 - THAT CONDITION BE MODIFIED TO SAY PRIOR TO SUBMITTAL OF THE TENTATIVE MAP, BECAUSE THE INTENT WAS AGAIN THAT THIS - IF YOU WORKED OUT ALL THESE CONDITIONS IN THE SITE PLAN, THEN THE TENTATIVE MAP SHOULD GO VERY SMOOTHLY. THERE SHOULDN'T BE SIGNIFICANT CHANGES AT THE TENTATIVE MAP LEVEL. SO IT WAS CHANGED AT THE COUNCIL MEETING.

Q. I WANT TO MAKE SURE I UNDERSTAND THIS. PRIOR TO THE COUNCIL MEETING, AT WHAT STAGE DID THE STAFF RECOMMENDATION CONTEMPLATE THAT THE DEVELOPER WOULD HAVE TO OBTAIN APPROVAL OF THE RESTORATION PLAN?

A. IT WAS AFTER THE TENTATIVE MAP APPROVAL. I BELIEVE THE PRECISE WORDING WAS PRIOR TO THE FINAL MAP.

Q. AS A RESULT OF THE DELIBERATIONS BY THE CITY COUNCIL, HOW DID THAT CHANGE?

A. IT WAS CHANGED TO SAY PRIOR TO THE SUBMITTAL OF THE TENTATIVE MAP.

Q. FROM A PLANNING PERSPECTIVE, WHAT IS THE SIGNIFICANCE OF [p. 832] THAT CHANGE?

A. AGAIN, THERE WERE CHANGES TO THE SITE PLAN. RATHER THAN THE DEVELOPER SPENDING A LOT OF ENGINEERING TIME AND DEVELOPMENT TO DO A TENTATIVE MAP THAT MAY SUBSTANTIALLY CHANGE, THIS WOULD ALLOW THE SITE PLAN, IF IT MET THOSE CONDITIONS, OR IF IT WAS REVISED, THEN THE TENTATIVE MAP WOULD GO THROUGH VERY SMOOTHLY.

\* \* \*

[p. 845] Q. AM I CORRECT THE FIRST PUBLIC HEARING ON THE TENTATIVE MAP FOR THIS PROJECT, THE 190 PROJECT, WAS ON MAY 6, 1986?

A. THAT'S CORRECT.

Q. PRIOR TO THAT HEARING, WAS A STAFF REPORT PREPARED?

A. YES, IT WAS.

Q. DID THAT STAFF REPORT INCLUDE A RECOMMENDATION AS TO WHAT STAFF FELT SHOULD BE DONE WITH THE APPLICATION?

A. YES.

THE COURT: SORRY. YOUR QUESTION ABOUT FISH AND WILDLIFE, YOU NEVER HAD A LETTER OR HADN'T UP UNTIL THAT POINT IN TIME?

THE WITNESS: WE HAD RECEIVED LETTERS FROM FISH AND WILDLIFE, BUT WE HAD NOT RECEIVED THEIR FINAL RESPONSE AS OF THE DATE OF THE STAFF REPORT. SO WE WERE WAITING FOR THEIR FINAL RESPONSE ON THE FINAL RESTORATION PLAN.

THE FINAL RESTORATION PLAN, I BELIEVE, WAS COMPLETED BY DOCTOR BRIGHT, AT LEAST THE ONE WE HAVE, DATED FEBRUARY OF 1986. SO THAT WAS AFTER THE PLANNING COMMISSIONS DECISION. AND WE WERE WAITING FOR THESE TWO AGENCIES TO REVIEW AND [p. 846] COMMENT ON THAT.

THE COURT: WHICH TWO, FISH AND GAME AND FISH AND WILDLIFE?

THE WITNESS: THAT'S CORRECT.

Q. (BY MR. YUHAS) MR. WOJTKOWSKI, I HAVE HANDED YOU WHAT IS EXHIBIT 143.

CAN YOU TELL ME WHAT THAT IS?

A. THIS IS ANOTHER STAFF REPORT FROM MYSELF TO THE CITY COUNCIL.

Q. IS THIS THE STAFF REPORT THAT INCLUDES THE STAFF RECOMMENDATION AS TO THE 190-UNIT APPLICATION FOR APPROVAL?

A. THAT'S CORRECT.

Q. ON THE FIRST PAGE UNDER HABITAT RESTORATION PLAN, DOES THAT REFLECT THE RECOMMENDATIONS STAFF WAS MAKING?



A. ON THE FIRST PAGE?

Q. YES.

A. THE FIRST PAGE IS SOME OF THE ISSUES, THE MAJOR ISSUES, TO BE CONSIDERED.

Q. IF YOU WOULD READ FOR THE JURY THAT PARAGRAPH, PLEASE.

A. WHICH PARAGRAPH?

Q. THE PARAGRAPH UNDER HABITAT RESTORATION PLAN.

A. YES.

"ATTACHED FOR YOUR REVIEW IS A SUMMARY PREPARED BY PLANNING SERVICES MANAGER NORTON OF DATA AND CORRESPONDENCE PERTAINING TO THE HABITAT RESTORATION [p. 847] PLAN. UNFORTUNATELY, THE CONFUSION RESULTING FROM DIFFERENT EXPERT OPINIONS HAS NOT ONLY BEEN RESOLVED, BUT TO SOME DEGREE HAS BEEN MAGNIFIED. NOT ONLY IS THERE DISAGREEMENT ON THE HABITAT RESTORATION, BUT THERE IS ALSO DISAGREEMENT ON THE LOCATION OF EXISTING HABITAT. BECAUSE THIS DECISION COULD HAVE MAJOR RAMIFICATIONS ON THE SITE PLAN, THIS PROJECT SHOULD NOT PROCEED UNTIL THIS ISSUE IS RESOLVED."

Q. AM I CORRECT THAT YOUR RECOMMENDATION IS INCLUDED ON THIS AND OTHER ISSUES ON THE SECOND PAGE?

A. YES.

Q. AGAIN, YOUR RECOMMENDATION IS THE MATTER BE DENIED?

A. THAT'S CORRECT.

\* \* \*

[p. 848] Q. LET'S TALK ABOUT THE INFORMATION AVAILABLE TO THE CITY COUNCIL REGARDING SOME OF THE CONDITIONS THAT WERE INCLUDED IN THE SITE PLAN THAT WAS APPROVED IN SEPTEMBER OF '84. WE HAVE TALKED ABOUT ONE OF THE CONDITIONS WAS THE SITE PLAN - THAT THE RESTORATION PLAN BE REVIEWED AND APPROVED BY FISH AND WILDLIFE, CORRECT?

A. YES, THAT'S CORRECT.

Q. I HAVE HANDED YOU WHAT IS EXHIBIT 145 WHICH HAS BEEN RECEIVED IN EVIDENCE IN THIS CASE. [p. 849] WHAT IS THIS?

A. THIS IS A LETTER FROM FISH AND WILDLIFE SIGNED BY WILLIAM SHAKE, AND IT'S ADDRESSED TO JOYCE STEVENS, COASTAL COMMITTEE OF THE SIERRA CLUB.

Q. I NOTICE IT'S DATED MAY 5, 1986, SHORTLY BEFORE THE DATE OF THE FIRST PUBLIC HEARING.

WAS THIS LETTER MADE AVAILABLE TO THE CITY COUNCIL IN THE COURSE OF THAT HEARING?

A. THAT'S CORRECT.

Q. WHO IS JOYCE STEVENS?

A. SHE'S A REPRESENTATIVE OF THE SIERRA CLUB.

Q. DO YOU RECALL WHETHER SHE WAS AT THE PUBLIC HEARING ON MAY 6?

A. I BELIEVE SHE WAS, AND SHE SPOKE TO THE COUNCIL.

Q. IF YOU LOOK AT THE SECOND PARAGRAPH OF THAT LETTER, THERE IS A REFERENCE IN THE FIRST SENTENCE TO THE BIOLOGICAL OPINION TO THE VETERANS ADMINISTRATION.

DO YOU KNOW WHAT THAT REFERS TO?

A. YES.

Q. WHAT DOES THAT REFER TO?

A. IT'S THIS REQUIREMENT, I GUESS, ONE FEDERAL AGENCY RESPONDING TO ANOTHER FEDERAL AGENCY WHERE IF THIS RESTORATION PLAN OR IN THIS PROJECT, I MEAN, WILL JEOPARDIZE THE CONTINUED EXISTENCE OF A LISTED SPECIES, AND IT'S SBB OR SMITH'S BLUE BUTTERFLY.

[p. 850] Q. YOU HAD MADE REFERENCE THIS AFTERNOON TO A THICK LETTER YOU HAD SEEN WRITTEN BY FISH AND WILDLIFE TO VIRGIL COCHRAN (PHONETIC), OR SOMETHING.

IS THAT WHAT YOU UNDERSTOOD THE BIOLOGICAL OPINION TO BE?

A. YES. THAT WAS THE LETTER DATED SOMETIME IN THE SPRING OF 1985.

Q. IN THE SECOND PARAGRAPH OF THIS LETTER AM I CORRECT THAT FISH AND WILDLIFE COMMENTS UPON THE RESTORATION PLAN BEING PROPOSED BY THE PLAINTIFF?

A. YES, IT DOES.

Q. WOULD YOU READ FOR THE JURY THAT PARAGRAPH BEGINNING WITH THE CITY OF MONTEREY?

A. THE SECOND PARAGRAPH?

Q. IN THE SECOND PARAGRAPH BEGINNING WITH THE CITY OF MONTEREY. THE CITY OF MONTEREY HAS A COPY OF THAT OPINION.

A. SORRY. THAT IS IN THE FIRST PARAGRAPH.

"THE CITY OF MONTEREY HAS A COPY OF THAT OPINION AND WE HOPE IT WILL NOT BE MISCONSTRUED AS APPROVAL OF THE PROJECT OR THE RESTORATION PLAN. OUR POSITION HAS BEEN CLEARLY STATED. THE PROJECT WILL DESTROY MOST IF NOT ALL OF THE SMITH'S BLUE BUTTERFLIES AND THEIR HOST PLANTS ON THE SITE, (PAGE 6) AND THE FINAL RESTORATION PLAN WILL NOT LIKELY SUCCEED IN REPLACING LOST HABITAT OR PRESERVING SMITH'S BLUE [p. 851] BUTTERFLIES AT THAT LOCATION, (PAGE 10).

THE COURT: THAT IS FISH AND GAME OR FISH AND WILDLIFE?

MR. YUHAS: FISH AND WILDLIFE.

THE COURT: WHAT EXHIBIT?



MR. YUHAS: EXHIBIT 145.

THE COURT: IS THAT THE LAST COMMUNICATION FROM FISH AND WILDLIFE BEFORE THE MEETING?

MR. YUHAS: YOU ANTICIPATE THE QUESTION.

Q. THIS WAS DATED THE DAY BEFORE THE PUBLIC HEARING; IS THAT CORRECT?

A. THAT'S CORRECT.

Q. BETWEEN THE DATE OF THIS LETTER AND THROUGH THE PUBLIC HEARING IN JUNE OF 1986, WERE ANY ADDITIONAL LETTERS RECEIVED FROM FISH AND WILDLIFE?

A. NO, NOT TO MY KNOWLEDGE.

\* \* \*

[p. 855] Q. THANK YOU. NOW, THE SEPTEMBER 1984 CONDITIONAL SITE PLAN APPROVAL ALSO REQUIRED INPUT AND APPROVAL FROM THE DEPARTMENT OF FISH AND GAME?

[p. 856] A. THAT'S CORRECT.

Q. BY THE WAY, WAS THERE ANY REPRESENTATIVE OF FISH AND WILDLIFE AT THE MAY OR JUNE HEARINGS?

A. NO, THERE WAS NOT.

Q. WAS THERE A REPRESENTATIVE FROM THE DEPARTMENT OF FISH AND GAME?

A. YES, THERE WAS.

Q. DO YOU RECALL WHO THAT WAS?

A. IT WAS A MR. JOHNSON.

Q. PRIOR TO THIS HEARING, HAD YOU HAD OCCASION TO MEET OR DEAL WITH MR. JOHNSON?

A. I PERSONALLY HADN'T.

(PAUSE IN PROCEEDINGS)

Q. I HAVE HANDED YOU EXHIBIT 147.

CAN YOU TELL THE MEMBERS OF THE JURY WHAT THIS ENTIRE DOCUMENT IS?

A. THESE ARE THE CITY COUNCIL MINUTES OF THE MAY 6, 1986 MEETING.

Q. IF YOU WOULD DIRECT YOUR ATTENTION TO PAGE 10 OF THESE MINUTES TO THE TOP PARAGRAPH, DO THESE MINUTES AT THAT POINT REGARD REPORT ON COMMENTS MADE BY MR. JOHNSON FROM THE DEPARTMENT OF FISH AND GAME?

A. YES, THEY DO.

Q. DO THOSE COMMENTS RELATE TO THE ADEQUACY OF THE RESTORATION PLAN?

[p. 857] A. YES, THEY DO.

Q. WOULD YOU PLEASE READ FOR THE JURY THE PORTION OF THE MINUTES THAT DEAL WITH MR. JOHNSON'S COMMENTS?

A. YES.

"MR. MICHAEL JOHNSON, CALIFORNIA STATE DEPARTMENT OF FISH AND GAME, STATED THAT THE DEPARTMENT HAS PROBLEMS WITH THE PROJECT, POINTED OUT THE SMITH'S BLUE BUTTERFLY WAS AND IS ENDANGERED, THAT NO PRESERVATION PLAN EXISTS FOR THE SITE, AND THE RESTORATION PLAN HAS NOT BEEN APPROVED."

Q. DO THESE MINUTES ACCURATELY RECORD THE COMMENTS MADE BY MR. JOHNSON AT THAT PUBLIC HEARING?

A. YES, THEY DO.

\* \* \*

[p. 865] Q. LET'S SWITCH GEARS A LITTLE BIT TO THE ACCESS ISSUE.

PRIOR TO THE PUBLIC HEARINGS, DID ANYONE REALLY OBJECT TO THE CHOICE OF THE ACCESS ROUTES THAT WERE BEING CONSIDERED?

A. YES, THERE WERE SOME OBJECTIONS. OBVIOUSLY, THE COASTAL COMMISSION STAFF. THIS MR. MOM (PHONETIC) WHO OWNS PART OF A SMALL PARCEL ADJACENT TO THE PONDEROSA SITE, HE RAISED SOME SERIOUS CONCERNS.

Q. WAS THERE ANY DISAGREEMENT BETWEEN THE CITY AND ITS STAFF AND THE DEVELOPER AS TO WHAT THE APPROPRIATE ACCESS ROUTES SHOULD BE?

A. NO, I DO NOT BELIEVE SO.

Q. IN THE COURSE OF THE INFORMATION PROVIDED TO THE CITY STAFF AND THEN PROVIDED TO THE CITY COUNCIL, DID THE PLAINTIFF PROVIDE ANY INFORMATION CONCERNING ITS EFFORTS TO ACQUIRE THE EASEMENT THAT WOULD BE NEEDED TO ACCOMPLISH THE SECONDARY ACCESS?

A. THROUGH TIDE AVENUE?

Q. YES.

A. NO, THERE WAS NO INFORMATION AT ALL.

Q. DID HE PROVIDE ANY INFORMATION CONCERNING THE EXPECTED COSTS OF ACQUIRING THAT EASEMENT?

A. NO, HE DID NOT.

Q. DID HE PROVIDE ANY INFORMATION AS TO HOW HE WOULD HANDLE THE REIMBURSEMENT OF THE CITY IF THE CITY WERE TO CONDEMN THAT [p. 866] PROPERTY?

A. NO, IT WAS NEVER BROUGHT UP.

Q. DID HE PROVIDE ANY INFORMATION SUGGESTING THAT HE IN FACT EXPECTED THE CITY TO CONDEMN THAT PROPERTY FOR IT?

A. NO. TO THE BEST OF MY KNOWLEDGE, IT WAS NEVER MENTIONED.

Q. NOW, AT THE CITY COUNSEL HEARING, WAS IT DISCUSSED WITH THE CITY COUNCIL MEMBERS THAT THE CITY MIGHT BE EXPECTED TO CONDEMN THIS PROPERTY TO PROVIDE THIS NEEDED SECONDARY ACCESS?



A. YES, THAT WAS BROUGHT UP.

Q. DID MEMBERS OF THE CITY COUNCIL EXPRESS CONCERN ABOUT USING THIS POWER OF CONDEMNATION?

A. THEY DID VERY MUCH.

Q. THE CITY DOES HAVE THE POWER TO CONDEMN PROPERTY?

A. THEY DO.

Q. WHAT IS POWER OF EMINENT DOMAIN?

A. THE POWER OF EMINENT DOMAIN IS THE POWER OF AN AGENCY TO ACQUIRE PROPERTY FROM AN UNWILLING SELLER. THEY CAN FORCE A SALE UPON PROPERTY.

Q. SINCE YOU HAVE BEEN WITH THE CITY, HAS THE CITY EXERCISED ITS POWER OF EMINENT DOMAIN?

A. I CANNOT RECALL ANY INSTANCE WHERE WE DID THAT.

Q. ARE THEIR SITUATIONS WHERE THE CITY HAS HAD TO ACQUIRE PROPERTY FOR ITS OWN PURPOSES?

A. YES. FOR WIDENING THE STREETS.

Q. IN THOSE SITUATIONS, HOW HAS IT GONE ABOUT ACQUIRING THE [p. 867] PROPERTY?

A. THE CITY TRIES TO NEGOTIATE WITH THE PROPERTY OWNER.

Q. DOES THE CITY HAVE ANY POLICIES, FORMAL POLICIES, REGARDING THE EXERCISE OF THE POWER OF EMINENT DOMAIN?

A. THERE IS A FORMAL POLICY IN THE CITY CHARTER THAT PROHIBITS THE CITY FROM ACQUIRING PRIVATE PROPERTY FOR PRIVATE PURPOSES WITHOUT A VOTE OF THE PEOPLE IN THE CITY.

Q. WOULD THAT SPECIFIC POLICY HAVE APPLICATION TO THIS PARTICULAR SITUATION?

A. NO. BECAUSE THIS WOULD BE ACQUIRING AN EASEMENT OR THE RIGHT-OF-WAY FOR A PUBLIC STREET OR A PUBLIC EMERGENCY ACCESS.

Q. IN YOUR DEALINGS WITH STAFF WITHIN THE CITY AND THE CITY COUNCIL ON OTHER OCCASIONS, WHAT GENERALLY WAS THE ATTITUDE OF THE CITY TOWARDS EXERCISING ITS POWER OF EMINENT DOMAIN?

MR. JACOBSEN: I OBJECT. THAT CALLS FOR SPECULATION.

THE COURT: YES. THAT IS PRETTY GENERAL. I WILL SUSTAIN THE OBJECTION.

Q. (BY MR. YUHAS) WAS THERE ANY FORMAL POLICY WITHIN THE CITY THAT WOULD PRECLUDE THE CITY FROM EXERCISING THE POWER OF EMINENT DOMAIN IN THE PRESENT CASE IF THE CITY COUNCIL CHOSE TO DO SO?

A. NO, NOT TO MY KNOWLEDGE.

Q. BASED UPON YOUR EXPERIENCE WITH THE CITY, ITS POLICIES, PROCEDURES AND REGULATIONS, WHAT TYPES OF INFORMATION WOULD BE [p. 868] IMPORTANT TO THE CITY COUNCIL IN DETERMINING WHETHER TO EXERCISE THAT POWER?

A. THEY WOULD LOOK AT THE COST OF THAT, I BELIEVE, LOOK AT OTHER ALTERNATIVES TO THAT PROCESS, WHAT MEANS OF PAYING FOR IT, LEGAL COSTS, WE ALSO ACQUISITION COSTS.

Q. WAS ANY OF THAT INFORMATION PROVIDED TO THE CITY COUNCIL AT EITHER THE MAY OR JUNE HEARINGS?

A. NO.

\* \* \*

[p. 872] CAN YOU TELL THE JURY WHAT EXHIBIT 151 IS?

A. THIS IS A RESOLUTION OF THE CITY COUNCIL 86-96, AND IT'S ADOPTING FINDINGS IN SUPPORT OF DENIAL OF THE 190-UNIT PROJECT.

Q. WHO WITHIN THE CITY ACTUALLY DRAFTS THE FINDINGS?

A. AT THIS POINT WHERE THE COUNCIL GAVE SOME DIRECTION, IT WOULD BE THE CITY ATTORNEY'S OFFICE. THE CITY ATTORNEY.

Q. DID YOU PARTICIPATE IN THE PROCESS OF DRAFTING THE FINDINGS?

A. YES, I WOULD REVIEW AND COMMENT ON THEM.

Q. IF YOU WOULD LOOK AT THE FIRST FINDING, THAT'S THE FINDING RELATING TO THE SAND RELOCATION AND GRADING ISSUE.

A. YES.

Q. THAT MAKES REFERENCE TO CERTAIN ENVIRONMENTAL IMPACTS, CORRECT?

A. YES, IT DOES.

Q. WHAT ENVIRONMENTAL IMPACTS ARE BEING ADDRESSED BY THIS FINDING?

MR. JACOBSEN: OBJECTION. THAT CALLS FOR SPECULATION AND NO FOUNDATION.

THE COURT: I THINK IT HAS FOUNDATION. I WILL OVERRULE THE OBJECTION.

THE WITNESS: AS I MENTIONED BEFORE, IT REALLY DIDN'T DEAL WITH THE GRADING. IT DEALT WITH THE CONSEQUENCES OF THE GRADING, THE SAND RELOCATION AND HOW MANY CUBIC YARDS [p. 873] AND WHETHER IT HAD TO BE TAKEN OFF SITE, AND IF THEY WERE GOING TO STAY ON SITE, WHAT WOULD BE THE RAMIFICATIONS OF THAT.

Q. ASIDE FROM YOUR EXPERIENCE BASED UPON BEING THERE, DID THE FINDINGS THEMSELVES -

LET ME TAKE IT A STEP BACK: DOES THE REFERENCE TO ENVIRONMENTAL IMPACTS IN FINDING



NUMBER 1 RELATE TO IMPACTS ON THE BUTTERFLY HABITAT?

A. NO. AS I MENTIONED, IT DEALT WITH THE SAND RELOCATION ISSUES AND THE VIEW IMPACTS THAT MIGHT RESULT FROM THAT, OR IF YOU HAD TO TAKE THE SAND OFF SITE, THE CONSEQUENCES OF THAT.

Q. OTHER THAN YOUR RECOLLECTION AND BEING INVOLVED AT THAT TIME, IS THERE ANYTHING WITHIN THESE FINDINGS THAT DEMONSTRATES THAT THE ENVIRONMENTAL IMPACTS REFERENCED HERE ARE NOT IMPACTS DEALING WITH THE BUTTERFLY HABITAT?

A. WELL, THERE ARE SUBSEQUENT FINDINGS THAT DEAL SPECIFICALLY WITH THE BUTTERFLY HABITAT.

Q. IN FACT, IF YOU WOULD TAKE A LOOK AT THE SECOND PAGE, DOES THAT FINDING DEAL SPECIFICALLY WITH THE BUTTERFLY HABITAT?

A. SORRY? WHICH ONE?

Q. SECOND PAGE, FINDING NUMBER 4?

A. YES, IT DOES.

Q. WOULD YOU READ FINDING NUMBER 4 TO THE JURY?

A. FINDING NUMBER 4 SAYS:

"THE DESIGN OF THE SUBDIVISION AS NOTED IN 2 AND 3 [p. 874] ABOVE IS LIKELY TO CAUSE SUBSTANTIAL ENVIRONMENTAL

DAMAGE AND SUBSTANTIALLY INJURE THE HABITAT OF THE ENDANGERED SMITH'S BLUE BUTTERFLY."

Q. SO FINDING NUMBER 4 DOES NOT EXPRESSLY CROSS-REFERENCE TO FINDING NUMBER 1 DEALING WITH THE SAND AND GRADING?

A. NO. IT REFERS TO FINDINGS NUMBER 2 AND 3.

Q. WHICH OF THESE FINDINGS, AND I DON'T WANT TO BELABOR THIS, RELATE TO THE IMPACTS OF THE PROPOSED DEVELOPMENT ON THE BUTTERFLY HABITAT?

MR. JACOBSEN: I OBJECT. ONCE AGAIN, THAT CALLS FOR SPECULATION. THERE IS NO FOUNDATION. THE DOCUMENT SPEAKS FOR ITSELF.

THE COURT: NO. I WILL OVERRULE THE OBJECTION. HE CAN TESTIFY AS TO THE DOCUMENT.

THE WITNESS: NUMBER 4 DEALS WITH THE HABITAT AS DOES NUMBER 2.

Q. (BY MR. YUHAS) LOOKING AT NUMBER 2, WAS IT KNOWN FROM THE BEGINNING OF THIS PROJECT THAT THE DEVELOPMENT WOULD HAVE SIGNIFICANT IMPACTS ON THE FLORA AND FAUNA?

A. WHAT DO YOU MEAN BY THE BEGINNING OF THIS PROJECT?

Q. AS FAR BACK AS WHEN THE ENVIRONMENTAL IMPACT REPORT WAS PREPARED.

A. SURE. THAT WAS FLAGGED AS AN ISSUE.

Q. WAS IT CONTEMPLATED THAT DESPITE HAVING THOSE TYPES OF IMPACTS THAT THE PROJECT COULD NONETHELESS PROCEED?

[p. 875] A. THAT'S TRUE. IT WAS FELT THAT THROUGH MITIGATION MEASURES THOSE PROBLEMS COULD BE RESOLVED.

Q. SPECIFICALLY WITH RESPECT TO THE HABITAT OF THE SMITH'S BLUE BUTTERFLY, WAS IT CONTEMPLATED THAT THOSE IMPACTS WOULD BE MITIGATED?

A. IT DEALT WITH THIS HABITAT RESTORATION PLAN THAT WOULD BE APPROVED BY THE CITY OF MONTEREY, BY THE STATE OF CALIFORNIA DEPARTMENT OF FISH AND GAME AND BY THE FEDERAL DEPARTMENT OF FISH AND WILDLIFE.

Q. WHAT DID THE CITY COUNCIL DETERMINE IN JUNE OF 1986 AS TO WHETHER THE RESTORATION PLAN ADEQUATELY MITIGATED THE ENVIRONMENTAL IMPACTS?

A. THEY FOUND IT DID NOT.

\* \* \*

[p. 1124] HAYWOOD

DIRECT NORTON / YUHAS

Q. FOCUSING SPECIFICALLY NOW ON HABITAT, IF I MAY, AND YOU HAVE BEFORE YOU I THINK EXHIBIT 26 AND EXHIBIT 28. IF YOU WOULD FOCUS ON EXHIBIT 28 FOR A MOMENT, CAN YOU TELL THE JURY WHAT EXHIBIT 28 IS AND I HAVE BLOWN UP

FOR THE JURY A PORTION OF IT, BUT CAN YOU EXPLAIN WHAT THIS ENTIRE DOCUMENT IS?

A. THIS WAS A LETTER TO MR. ED BROWN, THE EXECUTIVE DIRECTOR OF THE COASTAL COMMISSION, FROM MYSELF EXPLAINING THE POLICY MODIFICATIONS AND THE RESPONSE TO THE MODIFICATIONS THAT WERE SUGGESTED IN THE TWO COASTAL COMMISSION STAFF REPORTS.

Q. NOW, ATTACHED TO THAT LETTER ARE A COUPLE OF RESOLUTIONS SOMETHING CALLED AN ADDENDUM DATED FEBRUARY 22, 1984, CORRECT?

A. YES.

Q. WHAT IS THAT ADDENDUM? WHAT DOES THAT SHOW?

A. THIS SHOWS THE POINTS THAT WE COULD AGREE ON OUT OF THEIR STAFF REPORT AND IT WAS PRIMARILY THE LANGUAGE THAT WAS UNDERLINED AND THEN IT ALSO SHOWS THE LANGUAGE, THE [p. 1125] ORIGINAL LANGUAGE OF THE COASTAL COMMISSION STAFF.

Q. SO IN EFFECT THIS SHOWS WHAT THE CITY'S PROPOSAL WAS AND WHAT THE COASTAL COMMISSION'S RESPONSE WAS?

A. CORRECT.

Q. NOW, AS PART OF THE NEGOTIATIONS OVER THE HABITAT PROTECTION IN TERMS TO BE INCLUDED IN THE LAND USE PLAN, DID THE CITY HAVE A PROPOSAL AS TO THE CIRCUMSTANCES UNDER WHICH A DUNE RESTORATION PROGRAM SHOULD BE REQUIRED?

A. YES.

Q. AND WHAT DID THE CITY PROPOSE IN THAT REGARD?



A. THAT, I BELIEVE, IS ON PAGE 5. IT'S RELATED TO THE SMITH'S BLUE BUTTERFLY HABITAT THAT THE EXISTING SMITH'S BLUE BUTTERFLY HABITAT ON THE BACK DUNE RAISED AND HOW THEY ARE EXPOSED ON THE PHILLIPS PETROLEUM PROPERTIES AND HOME PROPERTIES.

Q. WHAT ABOUT THIS?

A. SHALL, SO AS TO AVOID THE MAXIMUM EXTENT VISIBLE, AVOID ANY DAMAGE OR ANY DIRECT CONSTRUCTION DAMAGE TO THE HABITAT FROM THE SITE OF THE OF NEW DEVELOPMENT. CONSTRUCTION DAMAGE DEVELOPMENT ACTIVITIES AND FROM DISRUPTION AFTER DEVELOPMENT IS IN PLACE.

Q. SO THE PROPOSAL THAT WAS MADE BY THE CITY WAS THAT IN CERTAIN AREAS THAT THE HABITAT SHALL BE PROTECTED TO THE MAXIMUM EXTENT FEASIBLE, CORRECT?

A. YES.

[p. 1126] Q. AND WHAT WAS THE COASTAL COMMISSION'S RESPONSE TO THAT?

A. THEY RESPONDED THAT ALL, THIS IS THE UNDERLINE, ALL ENVIRONMENTALLY SENSITIVE SHALL BE PROTECTED.

Q. SO THEY DELETED THE FEASIBILITY LIMITATION?

A. YES.

Q. NOW, ASIDE FROM AREAS WHERE THE SMITH'S BLUE BUTTERFLY WAS, AM I CORRECT THAT LOCAL COASTAL PLAN, THE LAND USE PLAN ALSO INCLUDED PROVISIONS DEALING JUST GENERALLY WITH RESTORATION PLANS?

A. YES.

Q. AND IF YOU LOOK AT THE BOTTOM OF PAGE 2, DOES THAT RELATE TO AND GOING ON TO THE NEXT PAGE THE CITY PROPOSAL REGARDING UNDER WHAT CIRCUMSTANCES THAT, JUST IN GENERAL TERMS THE DUNE RESTORATION PROGRAMS SHOULD BE REQUIRED AND THE COASTAL COMMISSION RESPONSE?

A. YES.

Q. AND WHAT DID THE CITY PROPOSE AS TO THE CIRCUMSTANCES UNDER WHICH A DUNE RESTORATION PROGRAM SHOULD BE REQUIRED?

A. WHERE IT DISTURBS THE DUNE VEGETATION.

Q. AND WHAT IS IT THAT THE COASTAL COMMISSION INSISTS BE INCLUDED INSTEAD OF THAT?

A. THEY INSERTED A FIGURE A WHICH IDENTIFIES DUNE HABITAT AREAS THAT ARE REPRESENTED ON THE MAP, SO THEY DREW A SQUARE ON THE MAP AND SAID THAT EVERYTHING WITHIN THIS AREA WAS TO BE SUBJECT TO THE HABITAT RESTORATION PROGRAM.

[p. 1127] Q. NOW, IN THE LAND USE PLAN PORTION THAT WAS PRESENTED TO THE COASTAL COMMISSION STAFF, DID IT INCLUDE ANY REQUIREMENT PRIOR TO THIS TIME THAT THE RESTORATION PLAN BE REVIEWED AND APPROVED BY ANY STATE OR FEDERAL AGENCIES?

A. I BELIEVE SO, YES.

Q. NOW, IF YOU LOOK AT PAGE 5, YOU SEE THE LANGUAGE WHERE IT SAYS THE BIOLOGICAL FIELD SURVEY MAPS?

A. YES.

Q. NOW, THAT LANGUAGE IS UNDERLINED HERE. WHAT DOES THAT INDICATE?

A. THAT THE PLANS WOULD BE SUBJECT TO THE REVIEW OF THE COASTAL COMMISSION, THE DEPARTMENT OF FISH AND GAME AND U.S. FISH AND WILDLIFE.

Q. WAS THIS LANGUAGE PROPOSED BY THE CITY OR BY THE COASTAL COMMISSION?

A. THIS LANGUAGE IS UNDERLINED. IT'S PROPOSED BY THE COASTAL COMMISSION.

Q. AND THE FACT THAT IT'S UNDERSCORED SUGGESTS THAT IT WAS ADDED TO THE LANGUAGE PROPOSED BY THE CITY?

A. YES.

Q. NOW, THIS DOCUMENT, THE THINGS THAT ARE INCLUDED IN THIS DOCUMENT, ARE THESE SUGGESTIONS OR RECOMMENDATIONS THAT THE CITY, IN FACT, INCORPORATED INTO THE LAND USE PLAN THAT IT LATER ADOPTED TO THE DEL MONTE BEACH AREA?

A. YES.

[p. 1417] JURY INSTRUCTIONS

NOW, GENERALLY SPEAKING WHAT IS THIS CASE ABOUT? THIS IS A FEDERAL CIVIL RIGHTS ACTION, AS YOU KNOW, BROUGHT BY THE PLAINTIFF, DEL MONTE DUNES AGAINST THE CITY OF MONTEREY.

NOW, THE DEL MONTE DUNES PARTNERSHIP OWNED THE REAL ESTATE THAT IS THE SUBJECT OF THIS ACTION, AND AS A RESULT OF THE DENIAL OF THE CITY, AS A RESULT OF THE CITY OF MONTEREY

DENIAL'S [sic] OF THE SUBDIVISION APPLICATION, DEL MONTE DUNES CLAIMS THAT THE CITY HAS DEPRIVED IT OF TWO CONSTITUTIONAL RIGHTS, FIRST THE RIGHT TO JUST COMPENSATION, THE TAKING OF ITS PROPERTY, WHAT WE CALL A TAKING CLAIM. AND WE ALSO USE A FANCY TERM CALLED INVERSE CONDEMNATION, THAT IS WHERE THE ACTIONS OF THE CITY HAVE, IF YOU FIND IT TO BE TRUE, TAKEN THE PROPERTY AND THE LAND OWNER IS ENTITLED TO BE RECOMPENSED.

THE SECOND CLAIM IS THE CLAIM FOR EQUAL PROTECTION, THE VIOLATION OF EQUAL PROTECTION UNDER LAW. NOW, THE CITY CAN BE LIABLE FOR THE KINDS OF ALLEGATIONS AND CHARGES BROUGHT BY THE PLAINTIFF HERE. OF COURSE, IT IS UP TO YOU TO DECIDE WHETHER THE CITY IS OR IS NOT. SO YOU HAVE TO DECIDE WHETHER THE PLAINTIFF, DEL MONTE DUNES, CONSTITUTIONAL [p. 1418] RIGHTS WERE VIOLATED AND IF SO WHETHER DEL MONTE DUNES HAS SUFFERED ANY DAMAGES AS A RESULT.

NOW, ON EACH OF THESE TWO CLAIMS, THE TAKING CLAIM AND THE EQUAL PROTECTION CLAIM, THE PLAINTIFF HAS THE BURDEN OF PROVING THE FOLLOWING ELEMENTS BY A PREPONDERANCE OF THE EVIDENCE.

NUMBER ONE, THAT THE ACTS OR OMISSIONS OF THE CITY WERE INTENTIONAL;

NUMBER TWO, THAT THE CITY ACTED UNDER COLOR OF LAW.

NOW, THAT SECOND ELEMENT HAS BEEN AGREED SO YOU REALLY DON'T NEED TO MAKE A DECISION ON THAT. IT IS JUST AN ELEMENT THERE THAT IS REQUIRED BY LAW THAT THERE HAS BEEN



A DISPUTE ABOUT, THAT THE CITY'S ACTIONS WERE UNDER THE COLOR OF LAW.

AND NUMBER THREE, THAT THE ACTS OR OMISSIONS OF THE CITY WERE THE PROXIMATE CAUSE OF THE DEPRIVATIONS OF PLAINTIFF'S RIGHTS PROTECTED BY THE CONSTITUTION.

THAT IS THE RIGHT NOT TO HAVE YOUR PROPERTY TAKEN WITHOUT COMPENSATION AND THE RIGHT TO EQUAL PROTECTION. SO THOSE ARE THE TWO CLAIMS AND IF YOU FIND THAT EACH OF THESE ELEMENTS AS THE CLAIM HAS BEEN PROVED, THEN YOUR VERDICT SHOULD BE FOR THE PLAINTIFF.

ON THE OTHER HAND, IF THESE ELEMENTS HAVE NOT BEEN PROVED YOUR VERDICT ON THAT CLAIM SHOULD BE FOR THE DEFENDANT.

[p. 1419] NOW, I WILL TURN NOW TO THE TAKING CLAIM. THE FIRST QUESTION THAT WILL BE ASKED IS, THE ACTIONS OF THE CITY OF MONTEREY, CULMINATING IN THE RESOLUTION OF JUNE 17, 1986, DID OR DID NOT RESULT IN THE TAKING OF PLAINTIFF'S PROPERTY. ONE OF THE CONSTITUTIONAL RIGHTS WHICH THE PLAINTIFF CLAIMS WAS VIOLATED BY THE CITY IS THE RIGHT TO JUST COMPENSATION FOR THE TAKING OF PROPERTY BY A GOVERNMENT.

AND THE FIRST AMENDMENT TO THE CONSTITUTION PROVIDES THAT NO - I AM GOING TO PARAPHRASE, PRIVATE PROPERTY SHALL NOT BE TAKEN FOR PUBLIC USE WITHOUT JUST COMPENSATION.

NOW, PLAINTIFF ASSERTS AND CLAIMS THAT THE DEFENDANT, THROUGH ITS ACTION, HAS TAKEN ITS PROPERTY. IN ORDER TO ESTABLISH

THAT THE CITY HAS TAKEN THE PLAINTIFF'S PROPERTY BY DENYING PLAINTIFF'S DEVELOPMENT APPLICATION, THE PLAINTIFF HAS THE BURDEN OF PROVING,

NUMBER ONE, THAT IT HAS BEEN DENIED ALL ECONOMICALLY VIABLE USE OF THE PROPERTY.

OR TWO, THAT THE CITY'S DECISION TO REJECT THE PLAINTIFF'S 190 UNIT DEVELOPMENT PROPOSAL DID NOT SUBSTANTIALLY ADVANCE A LEGITIMATE PUBLIC PURPOSE.

NOW, IF YOU FIND THAT EITHER OF THESE THINGS HAS BEEN PROVED, YOUR VERDICT INDEED IS FOR THE PLAINTIFF ON THIS TAKING CLAIM.

ON THE OTHER HAND, IF THESE THINGS HAVE NOT BEEN PROVED, THEN YOUR VERDICT SHALL BE FOR THE DEFENDANT ON THIS [p. 1420] TAKING CLAIM.

AND THE FOLLOWING ARE SOME ADDITIONAL ELEMENTS IN CONNECTION WITH YOUR FINDING WHETHER THERE HAS OR HAS NOT BEEN A TAKING. FOR THE PURPOSE OF A TAKING CLAIM, YOU WILL FIND THAT THE PLAINTIFF HAS BEEN DENIED ALL ECONOMICALLY VIABLE USE OF ITS PROPERTY, IF, AS THE RESULT OF THE CITY'S REGULATORY DECISION THERE REMAINS NO PERMISSIBLE OR BENEFICIAL USE FOR THAT PROPERTY. IN PROVING WHETHER THE PLAINTIFF HAS BEEN DENIED ALL ECONOMICALLY VIABLE USE OF ITS PROPERTY, IT IS NOT ENOUGH THAT THE PLAINTIFF SHOW THAT AFTER THE CHALLENGED ACTION BY THE CITY THE PROPERTY DIMINISHED IN VALUE OR THAT IT WOULD SUFFER A SERIOUS ECONOMIC LOSS AS THE RESULT OF THE CITY'S ACTIONS.

THE REGULATION OR ACTION BY THE CITY DOES NOT CONSTITUTE A TAKING SIMPLY BECAUSE

IT PREVENTS THE HIGHEST AND BEST USE OF THE PROPERTY. IN ORDER TO FIND THAT THE PLAINTIFF HAS BEEN DENIED ALL ECONOMICALLY VIABLE USE OF THE PROPERTY, THERE MUST BE A SHOWING THAT AFTER THE ACTION OF THE CITY THAT IS BEING CHALLENGED HERE, THE PROPERTY IS LEFT WITH NO REMAINING SIGNIFICANT VALUE.

PUBLIC BODIES, SUCH AS THE CITY, HAVE THE AUTHORITY TO TAKE ACTIONS WHICH SUBSTANTIALLY ADVANCE LEGITIMATE PUBLIC INTEREST AND LEGITIMATE PUBLIC INTEREST CAN INCLUDE PROTECTING THE ENVIRONMENT, PRESERVING OPEN SPACE AGRICULTURE, PROTECTING THE HEALTH AND SAFETY OF ITS [p. 1421] CITIZENS, AND REGULATING THE QUALITY OF THE COMMUNITY BY LOOKING AT DEVELOPMENT. SO ONE OF YOUR JOBS AS JURORS IS TO DECIDE IF THE CITY'S DECISION HERE SUBSTANTIALLY ADVANCED ANY SUCH LEGITIMATE PUBLIC PURPOSE.

THE REGULATORY ACTIONS OF THE CITY OR ANY AGENCY SUBSTANTIALLY ADVANCES A LEGITIMATE PUBLIC PURPOSE IF THE ACTION BEARS A REASONABLE RELATIONSHIP TO THAT OBJECTIVE.

NOW, IF THE PREPONDERANCE OF THE EVIDENCE ESTABLISHES THAT THERE WAS NO REASONABLE RELATIONSHIP BETWEEN THE CITY'S DENIAL OF THE CLAIMS PROPOSAL AND LEGITIMATE PUBLIC PURPOSE, YOU SHOULD FIND IN FAVOR OF THE PLAINTIFF. IF YOU FIND THAT THERE EXISTED A REASONABLE RELATIONSHIP BETWEEN THE CITY'S DECISION AND A LEGITIMATE PUBLIC PURPOSE, YOU SHOULD FIND IN FAVOR OF THE CITY. AS LONG AS THE REGULATORY ACTION BY THE CITY SUBSTANTIALLY ADVANCES THEIR LEGITIMATE PUBLIC PURPOSE, AND ITS UNDERLYING MOTIVES AND REASONS ARE NOT TO BE INQUIRED INTO.

NOW, IN ANALYZING WHETHER PLAINTIFF'S RIGHT TO COMPENSATION HAS BEEN VIOLATED, THAT IS THE PROPERTY WAS TAKEN, YOU ARE ENTITLED TO CONSIDER THE STAMP TO WHICH THE CITY, IN ITS REGULATION, INTERFERED WITH THE PLAINTIFF'S REASONABLE DISTINCT INVESTMENT BACK EXPECTATIONS. SO THOSE ARE YOUR INSTRUCTIONS OF THE LAW WITH RESPECT TO THE TAKING OF THIS CLAIM.

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